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In The

Supreme Court of the United States

October Term, 1992

LEONARD L. GUMPORT, Chapter 7 Trustee of the Bankruptcy Estate of Transcon Lines,

Cross-Petitioner,

v.

INTERSTATE COMMERCE COMMISSION,

Cross-Respondent.

Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, despite the filing and publication requirements of the Interstate Commerce Act, 49 U.S.C. §§ 10761(a) and 10762(a)(1), a motor common carrier must adhere to a discount tariff that contains individualized discount rates for specific shippers whose identities are deliberately concealed by numerical codes, the key for which is neither filed with the Interstate Commerce Commission nor open for public inspection.

2. Whether the filing and publication requirements of the Interstate Commerce Act, 49 U.S.C. §§ 10761(a) and 10762(a)(1), preclude the Interstate Commerce Commission from obtaining an injunction that requires the trustee of a bankrupt motor common carrier to adhere to secret-coded discount rates.

PARTIES TO THE PROCEEDING

The parties to the proceedings below were the Interstate Commerce Commission ("ICC") and Leonard L. Gumport, Chapter 7 Trustee of the Bankruptcy Estate of Transcon Lines ("Trustee").[1]

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[1] Although the ICC's complaint named Transcon Lines, the Chapter 7 debtor, as a party, it was not served and did not appear or otherwise participate in the proceedings. Transcon Lines was a wholly-owned subsidiary of Transcon, Incorporated, a New York Stock Exchange traded company, until April 1990, when it became a wholly-owned subsidiary of Growth Financial Corp. The Trustee represents the estate of Transcon Lines under 11 U.S.C. § 323(a).

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY AND REGULATORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 6

A. The Court Of Appeals Improperly Declined On Standing Grounds To Decide The Merits Of The Trustee's Challenge To The Illegal Secret-Coded Discount Rates 8

1. The Trustee Challenged Transcon's Secret-Coded Discount Rates for Individual Shippers as *Per Se* Discriminatory and as not Duly Filed and Published, in Violation of the Act; this was a Challenge both to the Legality of those Rates and to their Lawfulness 9

2. The Trustee Has Standing to Challenge Transcon's Secret-Coded Discount Rates for Individual Shippers 20

CONCLUSION 22

Appendix A 1a

Appendix B 4a

TABLE OF AUTHORITIES

Page

CASES

Arizona Grocery Co. v. Atchison, Topeka, and Santa Fe Ry. Co., 284 U.S. 370 (1932) 8, 11

Burlington Northern Inc. v. United States, 459 U.S. 131 (1982) 21

California Commercial Ass'n v. Wells, Fargo & Co., 14 I.C.C. 422 (1908) 11

Eastman Kodak Company – Petition for Declaratory Order – Certain Rates and Practices of Advanced United Expressways, Inc., 1991 Fed. Carr. Cas. (CCH), ¶ 37,928 (July 8, 1991) 17, 18

Friedman Bag Co., Inc. v. Max C. Pope, Trustee of the Estate of A.T.F. Trucking, Inc., Fed. Carr. Rpts. (CCH) ¶¶ 37,986.01 (May 22, 1992) 21

Interstate Commerce Commission v. Delaware, Lackawanna & Western R.R. Co., 220 U.S. 235 (1910) 11, 12

In Re Underbilling, 1 I.C.R. 813 (1888) 10

Jasper Wyman & Son, et al. – Petition For Declaratory Order – Certain Rates and Practices of Overland Express, Inc., 8 I.C.C.2d 246 (1992) 18

Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116 (1990) ..... *passim*

Milne Truck Lines, Inc. v. Makita U.S.A., Inc., 970 F.2d 564 (9th Cir. 1992) 21

National Indus. Transp. League – Petition To Institute Rulemaking on Negotiated Motor Common Carrier Rates, 3 I.C.C.2d 99 (1986) 7

TABLE OF AUTHORITIES – Continued

Page

Outstanding Relief For "Shipper Account Codes" – Individual Motor Common Carriers and Freight Forwarders, Special Tariff Authority No. 86-639, (April 29, 1986) 16

Petition for Declaratory Order – Discounts and Customer Account Codes, 8 I.C.C.2d 47 (1991)..... 16

Petition To Institute Rulemaking on Negotiated Motor Common Carrier Rates, 5 I.C.C.2d 623 (1989) 7

Rates For a Named Shipper or Receiver, 367 I.C.C. 959 (1984) 12, 17

Regular Common Carrier Conference v. United States, 793 F.2d 376 (D.C. Cir. 1986)..... 6, 16, 17

Revision of Tariff Regulations, All Carriers, 1 I.C.C.2d 404 (1984) 19

Southern Ry. Co. v. Reid, 222 U.S. 424 (1912)..... 11

Tariff Improvement, 365 I.C.C. 43 (1981) 18

Union Pacific R.R. Co. v. Nevada Power Co., 950 F.2d 1429 (9th Cir. 1991)..... 21

United States v. Chicago & Alton Ry. Co., 148 F. 646 (N.D. Ill. 1906), *aff'd on other grounds* 156 F. 558 (7th Cir. 1907), *aff'd*, 212 U.S. 563 (1909) 15

Wonderoast, Inc. – Petition for Declaratory Order – Certain Rates and Practices of Transportation Systems International, Inc., 8 I.C.C.2d 272 (1992)..... 18

TABLE OF AUTHORITIES – Continued

Page

STATUTES

11 U.S.C. § 323(a) ii
28 U.S.C. § 1254(1) 2
49 U.S.C. § 10101 20
49 U.S.C. § 10101(a)(1)(C) 13
49 U.S.C. § 10101(a)(1)(D) 13
49 U.S.C. § 10102(14) 10
49 U.S.C. § 10102(15)(B) 10
49 U.S.C. § 10741 9
49 U.S.C. § 10741(a) 12
49 U.S.C. § 10741(b) 12
49 U.S.C. § 10761 8
49 U.S.C. § 10761(a) 4, 9
49 U.S.C. § 10762(a)(1) 4, 9, 15
49 U.S.C. § 11705(b)(3) 8
49 U.S.C. § 11706(a) 21
Motor Carrier Act of 1980, Pub. L. 96-296, 94 Stat. 793 12

RULES AND REGULATIONS

49 C.F.R. § 1312.14(a)(3) 3, 12
S. Ct. R. 12.3 2
S. Ct. R. 13.5 2

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

Comments of Office of Compliance and Consumer Assistance Re: Ex Parte No. 196, Investigation of Motor Carrier Collective Ratemaking and Related Procedures or Practices 14, 17

H.R. Rep. No. 1069, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Admin. News 2293 12

ICC Annual Report (1887), *reprinted in* I. L. Sharfman, *The Interstate Commerce Commission*, Part III. vol. B (1936 ed.) 19

R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice*, § 6.36, at 387 (6th ed. 1986) 3

S. Rep. No. 46, 49th Cong., 1st Sess. 188 (1886) .. 10, 14

I. L. Sharfman, *The Interstate Commerce Commission*, Part III, vol. B (1936) 10, 11

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v.

INTERSTATE COMMERCE COMMISSION,

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**Cross-Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

CROSS-PETITION FOR WRIT OF CERTIORARI

The Trustee cross-petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, amended on October 23, 1992 (ICC App. 28a), and on December 10, 1992 (ICC App. 29a), was amended again on April 5,

1993, by striking the December 10, 1992 amendment, and by restoring the opinion to its October 23, 1992 form. The opinion in that form is included in the Appendix to the ICC's petition at 1a. The April 5, 1993 order is reprinted in the appendix to this cross-petition ("Trustee's App.," *infra*, at 4a-8a).

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1992. Cross-petitions for rehearing filed by the ICC and the Trustee were denied on November 25, 1992. Two additional timely petitions for rehearing filed by the Trustee were denied on April 5, 1993. Trustee's App. at 4a-5a. This cross-petition is therefore timely under S. Ct. R. 13.5. The Trustee disputes the ICC's suggestion that the time within which to petition for a writ of certiorari commenced to run on November 25, 1992, not April 5, 1993, when the Trustee's two remaining petitions for rehearing were denied by the court of appeals. Even in that case, however, the Trustee's cross-petition is filed within 30 days after receipt of the ICC's petition on March 25, 1993, and is timely as a conditional cross-petition under S. Ct. R. 12.3. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

In addition to the provisions of the Interstate Commerce Act (the "Act"), 49 U.S.C. § 10101 *et seq.*, reprinted

in the ICC's Appendix, other pertinent provisions of the Act and the ICC's regulation authorizing rates for single shippers, 49 C.F.R. § 1312.14(a)(3), are set forth in the Trustee's App. at 1a-3a.

STATEMENT OF THE CASE

The Trustee has filed contemporaneously with this cross-petition for a writ of certiorari a brief in opposition to the ICC's petition for a writ of certiorari. The Trustee's opposition includes a statement of the case that is relevant to this cross-petition, and which the Trustee hereby incorporates by reference.[2]

As noted in that statement, this case arises out of an action filed by the ICC to enjoin the Trustee from collecting undercharges from shippers who failed to pay under secret-coded discount rates within ninety days from the date of shipment, as required by Transcon's duly filed loss-of-discount tariff. Under that tariff, shippers who failed to pay on time owed Transcon's full tariff charges. The ICC contended that the loss-of-discount tariff could not be enforced because Transcon had failed to comply with certain credit regulations adopted by the ICC.

The ICC and the Trustee filed cross motions for summary judgment. Following the ICC's stipulation that there was no dispute as to any material fact, the district court granted summary judgment for the Trustee on two grounds:

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[2] *See* R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice*, § 6.36, at 387 (6th ed. 1986).

(1) that the ICC's credit regulations could not be enforced to the extent that they undermined the statutory filed-rate doctrine codified at 49 U.S.C. § 10761(a); and, as a second, alternate ground, (2) that the secret-coded discount rates violated the publication requirement of the Act, 49 U.S.C. §§ 10761(a) and 10762(a)(1). The ICC appealed from the summary judgment. The court of appeals affirmed on the first ground,[3] but reversed on the second, alternate ground. The latter holding is at issue in this cross-petition.

Transcon filed a variety of rates with the ICC. Its base rates were derived from a combination of "class rates"[4] and "bureau rates."[5] In addition, Transcon filed individualized discount rates for single shippers; the discounts were expressed as a percentage of the filed bureau rates. Ninety percent of all discounts given by Transcon were listed in a separate tariff filed with the ICC labelled "TCON 625." In over 98% of the discounts listed in TCON 625, the individual shippers receiving the discounts were identified only by indecipherable numerical codes. The

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[3] This is the subject of the ICC's petition and the Trustee's brief in opposition.

[4] Transcon's "class rates" came from a tariff filed with the ICC on behalf of Transcon and other carriers by the National Motor Freight Traffic Association, Inc. That tariff – the National Motor Freight Classification ("NMFC") – classified by transportation characteristics commodities transported by carriers. Each commodity is assigned a numerical designation called a "class" or rating on the basis of those characteristics.

[5] Transcon's "bureau rates" also came from tariffs filed with the ICC on behalf of Transcon and other carriers by carrier "bureaus." The bureau rates, in turn, provide the means of calculating the cost of shipping the goods classified in the NMFC between any two points in the United States.

key to the numerical codes was neither filed with the ICC nor open to public inspection. This left shippers no way to determine whether the rates Transcon gave them were higher, lower or the same as the rates Transcon gave the shippers' competitors.

The court of appeals "admit[ted] to being troubled by the ICC's policy of allowing codes alone to identify shippers," explaining that "[s]uch a practice leads to secrecy, and secrecy makes possible discrimination in rate-setting." ICC App. at 21a. Nevertheless, and while conceding that a carrier has standing to challenge the "legality" of its own rates, *id.* at 22a, the court of appeals concluded that the Trustee lacked standing to challenge the secret-coded rates in this case because he was challenging their "lawfulness," not their "legality." The court stated:

> Transcon, as a carrier, lacks standing to challenge the lawfulness [of] its own rates, for two reasons: (1) a carrier cannot obtain reparations from a shipper for undercharges; (2) a carrier's interests are not within the zone of interests protected by the Act."

Id.

On this basis, the court of appeals reversed and remanded to the district court for entry of the injunction sought by the ICC precluding the Trustee from collecting undercharges on the grounds of the illegality of the secret-coded discount rates. *Id.* at 27a.

REASONS FOR GRANTING THE PETITION

The Trustee and the ICC agree that this case involves a "significant enforcement action," ICC Petition at 8, but disagree about the reasons for its significance. In truth, the ICC's action is significant because it subverts this Court's decision in *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990) (*"Maislin"*), and forces the Trustee to adhere to a discount tariff that contains secretly negotiated discount rates between Transcon and specific shippers whose identities are deliberately concealed by numerical codes. By concluding that the Trustee lacked standing to challenge the secret-coded discount rates, the court of appeals has effectively reinstated the use of secret negotiated rates that this Court invalidated less than three years ago in *Maislin*. It also has undermined the rate stabilization policies of the filed rate doctrine. Rate destabilization means that Transcon's bankruptcy will be followed by bankruptcies of other carriers.

By refusing on standing grounds to address the validity of the illegal secret-coded discount rates,[6] the court

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[6] Notably, the ICC, which is charged with the administration of the Act, did not raise the standing issue; it was raised by the court of appeals, *sua sponte*. In any event, the court of appeals seriously erred in concluding that the Trustee lacked standing. The Trustee challenged the *"legality"* of those rates, not just their "lawfulness." Specifically, the Trustee challenged the rates as *illegal* on the grounds that they were not duly filed and published, in violation of the Act. *Regular Common Carrier Conference v. United States*, 793 F.2d 376 (D.C. Cir. 1986) (*"RCCC"*). This Court's decision in *Maislin* makes clear that a carrier has standing to challenge the legality of its own rates.

of appeals forced the Trustee to adhere to secret negotiated rates to the detriment of the Transcon estate, whose thousands of creditors include former employees, health and welfare pension funds, trade creditors, and state and local governments seeking reimbursement for environmental clean-up work at truck terminals throughout the United States.

The published opinion of the court of appeals undermines the Act. For almost one hundred years, this Court and the ICC uniformly held that rates for individual shippers were *per se* discriminatory and violated the Act. In 1984, during the period of the ICC's attempts to abolish the filed rate doctrine, which culminated in the adoption of the *Negotiated Rates* policy[7] later struck down by this Court in *Maislin*, the ICC amended its tariff regulations to permit the filing and publication of tariffs which contained rates available *only* for single shippers. In 1986, the ICC amended those regulations again, this time by authorizing the use of secret "shipper account codes" in tariff filings. Thus, in the space of just two years, the ICC turned the Act's provisions on tariff filing and Congressional intent on the same subject completely on their head – recasting the scheme from one designed to be non-discriminatory and open, to one that encourages the kind of secret rate making for favored shippers that the Act was intended to prohibit.

For these reasons, the Trustee's cross-petition should be granted and the judgment of the court of appeals should be summarily reversed.

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[7] *National Indus. Transp. League – Petition To Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 3 I.C.C.2d 99 (1986); *Petition To Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 5 I.C.C.2d 623 (1989).

A. The Court Of Appeals Improperly Declined On Standing Grounds To Decide The Merits Of The Trustee's Chalienge To The Illegal Secret-Coded Discount Rates.

The court of appeals rested its standing decision on a fine, but important distinction drawn under the Act between the "legal" rate and the "lawful" rate. Under the Act, a duly filed and published rate is deemed to be the "legal" rate. The legal rate is invariable by any agreement between the carrier and its shippers, or by any act or omission of the carrier, or on any other pretext. 49 U.S.C. § 10761; *Maislin*, 497 U.S. at 126-28. This rule, however, is subject to two exceptions: First, the legal rate is not enforceable if it is not duly filed or published, as required by the Act. A challenge of this kind is deemed to be a challenge to the rate's "legality." Citing *Maislin*, the court of appeals correctly observed that a carrier has standing to challenge the "legality" of its own rates. ICC App. at 22a. Second, the legal rate is not enforceable if that rate is "unreasonable" or "discriminatory." A challenge of this kind is deemed to be a challenge to the rate's "lawfulness."[8]

In the proceedings below, the Trustee challenged both the "legality" and the "lawfulness" of the secret-

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[8] As this Court explained in *Maislin*, " 'the legal rate was not made by the [Act] a lawful rate – it was lawful only if it was reasonable' " *Id.* at 128-29 (quoting *Arizona Grocery Co. v. Atchison Topeka, & Santa Fe Ry. Co.*, 284 U.S. 370, 384 (1932)). The Act gives shippers an express cause of action against carriers for damages in the amount of the difference between the tariff rate and the rate determined to be reasonable by the ICC. 49 U.S.C. § 11705(b)(3).

coded discount rates. He argued that the ICC could not obtain an injunction requiring him to adhere to Transcon's secret-coded discount rates because: (1) those rates were *illegal* in that they conceal the identities of the benefitted shippers by indecipherable secret codes and are not duly filed and published tariffs within the meaning of 49 U.S.C. §§ 10761(a) and 10762(a)(1); and (2) those rates were unlawful in that discount rates for individual shippers are *per se* discriminatory, in violation of 49 U.S.C § 10741, because, by definition, they are not available to all similarly situated shippers. The district court agreed with both of the Trustee's arguments. The court of appeals, however, reversed, erroneously concluding that the Trustee's entire challenge was directed solely to the rates' lawfulness, not also to their legality. This, then, is the crux of the case. If, as the Trustee contends, his challenge was to the *legality* of the rates, as well as to their lawfulness, the court of appeals' standing decision was improper, and its judgment remanding to the district court for the entry of an injunction against the Trustee should be summarily reversed and remanded with instructions to decide on the merits the Trustee's challenge to the legality of the secret-coded discount rates.

1. The Trustee Challenged Transcon's Secret-Coded Discount Rates for Individual Shippers as *Per Se* Discriminatory and as not Duly Filed and Published, in Violation of the Act; this was a Challenge both to the Legality of those Rates and to their Lawfulness.

More than one hundred years ago, Congress recognized that widespread discriminatory practices by railroads – including secret special rates for favored

shippers, drawbacks, rebates, personal concessions and favoritism – were creating inefficiency and inequality in common carriage, and that government intervention was required. As a result, in 1887 Congress passed the Act; its purpose was to secure equality of treatment for all like situated shippers, and to prohibit the discriminatory practices, which Congress condemned as "flagrant and reprehensible" forms of "arbitrary discrimination." S. Rep. No. 46, 49th Cong., 1st Sess. 188 (1886).

The Act codified a central principle of common carriage; namely that the common carrier has no right to conduct its business as a private enterprise. " 'The very name "common" carrier implies equality; it signifies common to all; the servant of the public. The adoption of the vocation carries with it the assurance imposed by one of the elementary principles of the common law, that every customer shall be served alike. . . . ' " I. L. Sharfman, *The Interstate Commerce Commission*, Part III, vol. B at 364 (1936) (quoting *In Re Underbilling*, 1 I.C.R. 813-14 (1888)).[9]

For these reasons, from its enactment in 1887, until 1984, the Act was consistently construed by the ICC,

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[9] The Act thus distinguishes between motor *common* carriers and motor *contract* carriers. A "motor common carrier" is defined by the Act as "a person holding itself out to the general public to provide vehicle transportation for compensation over regular or irregular routes." 49 U.S.C. § 10102(14). A "motor contract carrier," by contrast, is defined as "a person providing motor vehicle transportation of property for compensation under continuing agreements with one or more persons – (i) by assigning motor vehicles for a continuing period of time for the exclusive use of each such person; or (ii) designed to meet the distinct needs of each such person." 49 U.S.C. § 10102(15)(B).

courts and commentators as prohibiting rates for individual shippers. The ICC explained:

> [N]o portion [of the Act] is more definite or of greater public value than those provisions aimed at discrimination and preference, which under the decisions of our courts prohibit a classification of traffic upon the basis of the nature or character of consignees or consignors. A different rate may be given to the larger shipment, but it must be justified upon transportation conditions. The rate is made *as applying to the shipment, not to the shipper.*"

California Commercial Ass'n v. Wells, Fargo & Co., 14 I.C.C. 422, 428-29 (1908) (emphasis added).[10]

This Court agreed, stating in *Interstate Commerce Commission v. Delaware, Lackawanna & Western R.R. Co.*, 220 U.S. 235 (1910):

> The contention that a carrier, when goods are tendered to him for transportation, can make the mere ownership of the goods the test of the duty to carry, or, what is equivalent, may discriminate in fixing the charge for carriage, not upon any difference inhering in the goods or in the cost of the service rendered in transporting

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[10] *See also Southern Ry. Co. v. Reid*, 222 U.S. 424, 442 (1912) (carrier's rates must be "not only for one shipper or shipment, but for all shippers and shipments"); *Arizona Grocery Co. v. Atchison, Topeka, and Santa Fe Ry. Co.*, 284 U.S. 370, 384 (1932) (legal rates must be charged to all shippers alike); I. L. Sharfman, *The Interstate Commerce Commission*, Part III, vol. B at 361 (1936) (" '[T]he great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism' ") (citations omitted).

> them, but upon the mere circumstance that the shipper is or is not the real owner of the goods, is so in conflict with the obvious and elementary duty resting upon a carrier, and so destructive of the rights of shippers, as to demonstrate the unsoundness of the proposition by its mere statement.

Id. at 252.[11]

The Act codifies these principles, prohibiting all common carriers from subjecting any "person, place, port, or type of traffic to unreasonable discrimination." 49 U.S.C. § 10741(b); Trustee's App. at 1a.

In 1984, the ICC veered sharply from this established precedent by amending its regulations to permit tariffs for individual shippers. *See* 49 C.F.R. § 1312.14(a)(3); Trustee's App. at 3a. Citing the passage of the Motor Carrier Act of 1980 ("MCA"), Pub. L. 96-296, 94 Stat. 793, July 1, 1980, the ICC said its new rule was consistent with Congress' intent to deregulate the trucking industry. *See* Ex Parte No. MC-158, *Rates For a Named Shipper or Receiver*, 367 I.C.C. 959, 964 (1984).

The ICC was wrong.[12] The ICC used the same justification for adopting the *Negotiated Rates* policy, under

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[11] The Court in *Delaware* was applying the prohibitions against unreasonable discrimination in Sections 2 and 3 of the original Act. Those sections have been recodified and are now found at 49 U.S.C. §§ 10741(a) and (b).

[12] Congress did not intend that the MCA would effect complete deregulation of the trucking industry. Congress emphasized the need for continued regulation, and admonished the ICC to "stay within the powers specifically vested in it by the revised law." H.R. Rep. No. 1069, 96th Cong., 2d Sess. at 11,

which the ICC found it to be an unreasonable practice to negotiate an unfiled rate and subsequently seek to collect the higher filed rate. The ICC had argued that, in light of the more competitive environment, strict adherence to the filed rate doctrine was inappropriate and "unnecessary to deter discrimination today." *Maislin*, 497 U.S. at 134.

This Court in *Maislin* rejected both the *Negotiated Rates* policy and the ICC's justification for it. This Court explained that "[g]eneralized congressional exhortations to 'increase competition' cannot provide the ICC authority to alter the well-established statutory filed rate requirements," and warned the ICC that it "does not have the power to adopt a policy that directly conflicts with its governing statute." *Maislin*, 497 U.S. at 134-35.

Even the ICC's internal Office of Compliance and Consumer Assistance ("OCCA") condemned the rule allowing individual shipper rates as "*per se* discriminatory." OCCA explained:

> [A] published rate which simply records the fact that a discount has been granted to a particular shipper arguably is *not* a common carrier rate under the 1980 MCA. No other shipper, not even

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reprinted in 1980 U.S. Code Cong. & Admin. News 2293. The stated purpose of the National Transportation Policy, as amended by the MCA, is the "impartial regulation of the modes of transportation," and Congress directed the ICC to "encourage sound economic conditions in transportation, including sound economic conditions among carriers," and to "encourage the establishment and maintenance of reasonable rates for transportation, without unreasonable discrimination or unfair or destructive competitive practices." *See* 49 U.S.C. §§ 10101(a)(1)(C) and (D).

> a shipper which tenders the specified commodity, in the requisite quantity, from the named origin to the named destination, could ship under such a personalized rate. In OCCA'S view, these discounts are *per se* discriminatory. *Such personalized rates are in conflict with the basic concept of common carrier ratemaking.*

Comments of Office of Compliance and Consumer Assistance Re: Ex Parte No. 196, Investigation of Motor Carrier Collective Ratemaking and Related Procedures or Practices at 21 (emphasis added)("*OCCA Comments*"); Resp. SER, Vol. III at 292.

Admittedly, the Trustee's challenge to the discount rates as *per se* discriminatory was a challenge to the rates' lawfulness. As the court of appeals conceded, however, the Trustee also argued that the rates were not duly published because the identities of the shippers were deliberately concealed with indecipherable numerical codes, the key for which was neither filed with the ICC nor open for public inspection. ICC App. at 21a. This was plainly a challenge to the *legality* of the rates, and the court of appeals erred by holding otherwise. *See Transcript of Proceedings*, ICC App. at 45a-46a ("[the Trustee] argues that . . . a rate that keeps the customer's name hidden from competitors and from the [ICC] is illegal.")

Congress recognized that the surest means of securing equality in transportation was to require publicity of rates.[13] Thus, the Act requires the filing and publication

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[13] *See* S. Rep. No. 46, 49th Cong., 1st Sess. 189 (1886). The Report stated, "In the judgment of the committee one of the chief purposes of any legislation for the regulation of inter-State

of tariffs, making information on rates and services readily available to all shippers. 49 U.S.C. § 10762(a)(1). This Court has held that, under the Act, the only "legal" rate is the rate which is duly published and filed. *Maislin*, 497 U.S. at 126.

Courts have strictly adhered to the publication requirement, striking down any attempts to avoid the publication rule. For example, in *RCCC*, the ICC had approved a tariff rule allowing freight forwarders to charge unpublished rates based on averaging the prior charges to a particular shipper ("averaging rule"). The plaintiffs challenged the rule as a violation of the publication requirement. Then Judge Scalia writing for the D.C.

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commerce should be to secure the fullest publicity, both as to the charges made by common carriers and as to the manner in which their business is conducted. The business of a common carrier concerns practically the whole public, and the carrier exercises in some respects a public function. The people rightly feel that its charges should be public and open to all alike. . . ." *See also United States v. Chicago & Alton Ry. Co.*, 148 F. 646, 648 (N.D. Ill. 1906), *aff'd* on other grounds 156 F. 558 (7th Cir. 1907), *aff'd* 212 U.S. 563 (1909), where the court read into 49 U.S.C. § 10762(a)(1) the requirement that shippers' names be disclosed in tariff filings, and explained:

> The requirement of publication is imposed in order that the man having freight to ship may ascertain by an inspection of the schedules exactly what will be the cost to him of the transportation of his property; and not only so, but the law gives him another and a very valuable right, namely, the right to know, by an inspection of the same schedule, exactly what will be the cost to his competitor of the transportation of his competitor's property.

Circuit agreed, holding that tariffs based on the averaging rule left shippers with no way to determine the actual rate charged. "Under . . . the 'averaging rule' . . . the carrier's competitors do not even know how the 'averaging' is conducted, and the shipper does not know whether it is conducted in the same fashion for him as it is for other shippers." 793 F.2d at 380.[14]

In 1986, in the face of established precedent on the importance of the publication requirement in securing equality in transportation, the ICC endorsed the use of secret shipper account codes in tariffs. It justified this departure from precedent on the bare ground that, because the ICC had been routinely granting individual requests for permission to use the secret codes, "there appears to be no good reason to continue to require individual treatment of a tariff publishing practice that has now become standard." *Outstanding Relief For "Shipper Account Codes" – Individual Motor Common Carriers and Freight Forwarders*, Special Tariff Authority No. 86-639, (April 29, 1986), p.2. *See also Petition for Declaratory Order – Discounts and Customer Account Codes*, 8 I.C.C. 2d 47 (1991) (same).

OCCA, over whose objection the ICC authorized individual shipper tariffs, recognized that the ICC's endorsement of secret coded rates directly conflicted with

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[14] *RCCC* made clear that, without the filing and publication requirement, "it would be monumentally difficult to enforce the requirement that rates be reasonable and nondiscriminatory . . . and virtually impossible for the public to assert its right to challenge the lawfulness of existing or proposed rates." *Id.* at 379 (citations omitted).

the Act. OCCA explained: "[B]ecause 'code' discounting conceals the identity of the benefitting shipper, its proliferation challenges a principal safeguard against discrimination recognized in *Rates for a Named Shipper or Receiver*, 367 I.C.C. 959 (1984), i.e., the complaint process," and concluded:

> [D]iscounting practices by LTL carriers based on named shipper, shipper account code, and range of discount tariffs run afoul of the ICA's tariff filing and anti-discrimination requirements – provisions which were basically left untouched by the MCA reform of 1980 . . . In OCCA's view, contract carrier pricing concepts have been injected into common carrier ratemaking, contrary to the MCA's statutory scheme.

OCCA Comments at 24-25; Resp. SER, Vol. III at 295-96.

Like the averaging rule in *RCCC*, the use of secret account codes by Transcon prevents a shipper from determining the rates applied to its competitors, or even whether a rate applies to the shipper itself.[15] These facts underscore why the names and identities of shippers to whom rates apply are necessary tariff components. So does the ICC's own "four corners rule." That rule, which the ICC has invoked to prevent trustees from collecting undercharges, was applied in *Eastman Kodak Company – Petition for Declaratory Order – Certain Rates and Practices*

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[15] The record below included a letter from Lawrence C. Herzig, Chief, Section of Rates and Informal Cases of the ICC, to a shipper explaining that the ICC is unable to assist the shipper determine what discount applied to that shipper, stating "only you and the carrier would have knowledge as to what customer code was assigned to your account."

of Advanced United Expressways, Inc., 1991 Fed. Carr. Cas. (CCH), ¶ 37,928 (July 8, 1991) ("*Kodak*"). There, the ICC invalidated a carrier's discount tariff because limitations on the application of the discount were contained outside the tariff in "letters of participation" of the shippers. The ICC invalidated the tariff because these limitations could not be determined from the "four corners" of the tariff, and observed that "after *Maislin*, full disclosure concerning the discount to be published in tariffs and filed with the [ICC] is required." *Id.* at 47,486 and n.12. The rule was also applied in *Jasper Wyman & Son, et al. – Petition For Declaratory Order – Certain Rates and Practices of Overland Express, Inc.*, 8 I.C.C. 2d 246 (1992) (invalidating tariff because distance rates did not contain method to determine actual mileage between shipping points, and because the carrier had not properly participated in a filed distance guide referred to in the tariff that supplied the missing information); and in *Wonderoast, Inc. – Petition for Declaratory Order – Certain Rates and Practices of Transportation Systems International, Inc.*, 8 I.C.C. 2d 272 (1992) (invalidating tariff that failed to define commodity account codes).

In addition to the "four corners rule," other decisions of the ICC regarding rate codes establish that Transcon's secret-coded rates violate the Act's publication requirement. In those decisions, the ICC has authorized the use of codes *only* where the codes are explained in keys included in the tariffs. For example, in Ex Parte No. 370, *Tariff Improvement*, 365 I.C.C. 43 (1981), the ICC promulgated a regulation permitting the use in tariffs of location codes *provided* that an explanation of the codes is contained in the same tariff or in a separate tariff named as a

governing publication. In *Revision of Tariff Regulations, All Carriers*, 1 I.C.C. 2d 404 (1984), the ICC restated its rule permitting location codes, and reiterated the requirement that such codes be explained. In addition, the ICC authorized the use in tariffs of *carrier codes* and abbreviations *provided* they are *explained*. The ICC stated: *"Whatever symbols are used must be explained." Id.* (emphasis added).

The Trustee established below, and the district court agreed, that the secret-coded discounts contained in TCON 625 were not duly filed and published rates within the meaning of the Act. The coded discounts were simply announcements that the shippers listed there by indecipherable numerical codes had been granted secretly negotiated discounts from the filed bureau rates. The Trustee's challenge to the secret-coded rates on this ground was a challenge to the rates' *legality* – not to their lawfulness. Indeed, because the key to the codes was neither filed with the ICC nor open to public inspection, Transcon's discounting scheme was virtually identical to a practice of personal favoritism specifically condemned by the Act, namely where: "[t]he memorandum book carried in the pocket of the general freight agent often contained the only record of the rates made to the different patrons of the road. . . . " *ICC Annual Report* at 5-6 (1887), *reprinted* in part in I. L. Sharfman, *The Interstate Commerce Commission*, Part III, vol. B at 360-61 (1936 ed.).

2. The Trustee Has Standing to Challenge Transcon's Secret-Coded Discount Rates for Individual Shippers.

As the foregoing authorities demonstrate, the Trustee challenged the legality of the secret-coded discount rates, not just their lawfulness. The district court agreed that the rates were illegal because they violated the publication requirement, and invalidated them on that basis. Because the court of appeals conceded that a carrier has standing to challenge the legality of its own rates, the court's standing holding was clearly erroneous.

For this reason, the court's observations about "zones of interest" and "reparations" were irrelevant; they are also in error. First, *Maislin* makes clear that the interests asserted by the Trustee in his challenge to the secret-coded discount rates fall within the "zone of interests" the Act is intended to protect. And the Act itself makes this clear: It proclaims that its provisions are for the benefit of carriers, their employees, and shippers alike. 49 U.S.C. § 10101.

Second, contrary to the suggestion of the court of appeals, the Trustee is not seeking "reparations" for the past application of the secret-coded discount rates. "Reparations" is a remedy afforded shippers charged an unreasonable rate. Instead, the Trustee is seeking to enforce the filed rate, which *Maislin* requires him to do. If the secret-coded discount rates were not filed and published, as the Trustee contends, then the applicable rates are Transcon's base rates, which the court of appeals conceded were duly filed and published. Under the Act, a common carrier has the right and the obligation to collect

a duly filed rate in excess of an illegal rate. *See* 49 U.S.C. § 11706(a). This Court decided that issue in *Maislin*, where the trustee was authorized to collect the difference between the unfiled negotiated rates and the higher filed rates. *Maislin*, 497 at 119.[16]

The "reparations" cases on which the court of appeals relied are therefore inapplicable. *Burlington Northern Inc. v. United States*, 459 U.S. 131 (1982), and *Union Pacific R.R. Co. v. Nevada Power Co.*, 950 F.2d 1429 (9th Cir. 1991) involved a determination of what rates should apply when reviewing courts vacate for lack of clarity ICC orders that set *future* rates. But *future* rates are not at issue in this case, and the court of appeals does not suggest otherwise. Rather, as noted, the Trustee seeks to enforce Transcon's filed rate by collecting as undercharges the difference between the amount paid under the unpublished, and therefore illegal, secret-coded discount rates and the bureau rates, which concededly are duly filed and published.

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[16] *See also Milne Truck Lines, Inc. v. Makita U.S.A., Inc.*, 970 F.2d 564 (9th Cir. 1992) (because past shipments from Cerritos were not eligible for a discount rate applicable to shipments from San Jose, the carrier's undiscounted rate applied and formed the basis for undercharges); *Friedman Bag Co., Inc. v. Max C. Pope, Trustee of the Estate of A.T.F. Trucking, Inc.*, Fed. Carr. Rpts. (CCH) ¶¶ 37,986.01, 37,986.03 (May 22, 1992) (fact that tariffs upon which bankrupt carrier relied were inapplicable does not necessarily mean there is no basis for recovering any rate; if trustee can show another tariff applied, rates can be collected thereunder).

CONCLUSION

The Trustee's cross-petition for a writ of certiorari should be granted, the judgment should be summarily reversed, and the case remanded with instructions to the court of appeals to decide the merits of the Trustee's challenge to the legality of Transcon's secret-coded discount rates.

Respectfully submitted,

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APPENDIX A

Title 49, United States Code

§ 10741. Prohibitions Against Discrimination by Common Carriers.

(a) A common carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title [49 USCS §§ 10501 et seq.] may not charge or receive from a person a different compensation (by using a special rate, rebate, drawback, or another means) for a service rendered, or to be rendered, in transportation the carrier may perform under this subtitle than it charges or receives from another person for performing a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances. A common carrier that charges or receives such a different compensation for that service unreasonably discriminates.

(b) A common carrier providing transportation or service subject to the jurisdiction of the Commission under chapter 105 of this title [49 USCS §§ et seq.] may not subject a person, place, port, or type of traffic to unreasonable discrimination. However, subject to subsection (c) of this section, this subsection does not apply to discriminate against the traffic of another carrier providing transportation by any mode.

(c) A common carrier providing transportation subject to the jurisdiction of the Commission under subchapter, I, II, or III of that chapter may not subject a household goods freight forwarder providing service subject to the jurisdiction of the Commission under subchapter IV of

that chapter to unreasonable discrimination whether or not the household good freight forwarder is controlled by that carrier.

(d) Differences between the rates, classifications, rules, and practices of water and rail common carriers in effect for their respective types of transportation do not constitute a violation of this section or an unfair or destructive competitive practice under this subtitle.

(e) Differences between rates, classifications, rules, and practices of rail carriers providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title [49 USCS §§ 10501 et seq.] do not constitute a violation of this section if such differences result from different services provided by rail carriers.

(f) This section shall not apply to –

(1) contracts approved under section 10713 of this title [49 USCS § 10713] other than as provided in subsection (d)(2)(A)(ii) and (d)(2)(B) of such section [49 USCS § 10713(d)(2)(A)(ii) and (B)];

(2) surcharges or cancellations under section 10705a of this title [49 USCS § 10705a];

(3) separate rates for distinct rail services under section 10728 of this title [49 USCS § 10728];

(4) rail rates applicable to different routes; or

(5) expenses authorized under section 10751 of this title [49 USCS § 10751], except that with respect to rates described in paragraphs (2), (3), and (4), nothing in this subsection shall affect

the authority of the Commission under this section with respect to rate relationships between ports or within the same port.

49 C.F.R. Ch. X (10-1-92 Edition)

§ 1312.14(a)(3) Statement of rates and fares.

Rates may be published to apply from or to a named plant site, construction site, or other site, if its location is identified. Rates may be published for the account of a specifically named shipper or receiver.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-55036
DC #CV-91-5036 (Tx)

Interstate Commerce Commission,

Plaintiff-Appellant

vs.

Transcon Lines, a corporation; LEONARD L. GUMPORT, Chapter 7 Trustee, Defendants-Appellees

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ORDER

[Filed April 5, 1993]

Before: Robert Boochever, William A. Norris and John T. Noonan, Jr., Circuit Judges

The opinion as amended December 10, 1992 is hereby further amended by striking the amendment made December 10, 1992 and restoring the opinion, as follows:

In Slip op., p. 14392, paragraph 15 is hereby deleted and replaced by the following:

> The Trustee cannot make an end run around the limitations on the carrier's remedies and the Act's zone of interests by having a court find one filed rate unlawful and then moving to collect the other filed rate that still stands. To permit such a process would be to stand the Interstate Commerce Act on its head and give federal courts an authority over rates that has never been conceded by a statutory scheme where "court-ordered relief interferes with the

> delicate balance the Act strikes between the competing interests of shipper and carrier." *Burlington Northern*, 459 U.S. at 140.

With this amendment, the panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

The parties are reminded of Circuit Rule 4.6.b. Inasmuch as the opinion has been restored to its October 23, 1992 form the court deems it highly improbable that the amendment affected by this order offers any ground for a petition for rehearing or rehearing en banc.

This court's order granting Appellant Interstate Commerce Commission's motion to stay the mandate expired on January 7, 1993. The Motion filed on March 8, 1993 of Appellant Interstate Commerce Commission to stay issuance of the mandate is **DENIED.**

The mandate shall issue forthwith.

NORRIS, J. concurring:

I concur in the order denying the petitions for rehearing and rejecting the suggestions for rehearing en banc because I agree that the Trustee has no standing to challenge the lawfulness of its own rates. I write separately to

address a related point – the Trustee's attempt to establish standing by casting its challenge as one to the legality, rather than the lawfulness, of Transcon's rates. The Trustee contends that Transcon's coded tariff was not duly filed because neither the Commission nor the public could determine from the four corners of the tariff the identity of the shipper receiving each coded discount. As a result, the Trustee would have us strike the discount tariff and enforce as the filed rate the undiscounted bureau tariff, which was part of Transcon's filing and which suffers from no similar infirmity.

I confess to some misgivings about the legality of coded discounts and am pleased that the ICC has decided to address the issue. *See Reconsideration of Special Tariff Authorities Authorizing the Publication of Customer Account Codes in Tariffs*, I.C.C. Decision No. 40888 (Jan. 5, 1993). In this case, however, we cannot reach the question. For if coded rates are not duly filed and published rates, then to the extent Transcon's rates were coded, they were not filed. That is, for shipments subject to discount because payment was made within 90 days, Transcon had no rates on file, and thus no basis for collecting undercharges. *See Wonderoast, Inc. - Petition for Declaratory Order - Certain Rates and Practices of Transportation Systems International, Inc.*, 8 I.C.C. 2d 272, 278 (1992) (undercharges not available where no rates are filed).

In an attempt to establish an alternative filed rate for these shipments, the Trustee urges us to disaggregate Transcon's filing. He argues that, once the coded discounts are stricken, the filed rate is simply the bureau rate. But the bureau rate is only part of the filed rate. For shippers who pay within 90 days, the filed rate, if one

exists, is the bureau rate less the discounts. We cannot strike the discounts and enforce the undiscounted bureau rates in their stead. We would as soon invalidate only the coded restriction on who receives the discount rate, which would leave the Trustee vulnerable to shippers seeking overcharges for discounts denied because their customer numbers were not on the filed tariff. Either way, Transcon's rate filing must be reformed if the coded discounts are invalidated. But it is the Commission that has sole discretion to craft an appropriate remedy when the rates on file do not themselves comport with the law. *Maislin Industries v. Primary Steel*, 497 U.S. 116, 133 (*citing ICC v. American Trucking Assns., Inc.*, 467 U.S. 354, 364-65 (1984); *Genstar Chemical Ltd. v. ICC*, 665 F.2d 1304, 1308, *cert. denied*, 456 U.S. 905 (1981) ("where the shipper has been charged no more than the rate reflected in the tariff on file, the remedy for any unlawfulness or irregularity is measured not by looking to some other tariff but by the harm, if any, caused by the unlawfulness or irregularity").

The Trustee contends that this analysis conflicts with the first holding of our panel's opinion, namely that shippers who neglected to pay within 90 days are liable for undercharges. But under the rules tariff, shippers who fail to pay within 90 days cannot avail themselves of the coded discounts. The rates for those shipments – undiscounted bureau rates – are filed and enforceable regardless of the status of the coded rates.

The Trustee further contends that this analysis conflicts with existing Ninth Circuit and ICC decisions, but neither case he cites supports his argument. *Friedman Bag Co., Inc. v. Max C. Pope, Trustee of the Estate of A.T.F.*

Trucking, Inc., Fed. Carr. Rptrs. (CCH) ¶¶ 37,986.01 (May 22, 1992), 1992 MCC LEXIS 61, *13-*14, recognizes that when no filed rate applies to a shipment at issue, the shipper may collect a just and reasonable rate, but that only the ICC may fashion such a remedy. *Milne Truck Lines, Inc. v. Makita U.S.A., Inc.*, 970 F.2d 564, 568 (9th Cir. 1992), applied the filed rate, rather than reforming, deconstructing, or in any other way altering the carrier's filing.

In sum, the federal courts are charged with enforcing the filed rate when one exists, but when none exists, only the ICC can fashion a remedy. If coded discounts are illegal, the ICC, not the courts, must determine whether undercharges are available.

Supreme Court, U.S.
FILED
MAY 24 1993

No. 92-1725

In the Supreme Court of the United States

OCTOBER TERM, 1992

LEONARD L. GUMPORT, CHAPTER 7 TRUSTEE OF THE BANKRUPTCY ESTATE OF TRANSCON LINES,
CROSS-PETITIONER

v.

INTERSTATE COMMERCE COMMISSION

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE CROSS-RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether cross-petitioner, a trustee in bankruptcy for a motor carrier, has standing to challenge the validity of the carrier's tariff rates.

2. Whether the Interstate Commerce Commission reasonably determined to permit motor carriers to file discount tariffs with shipper-account codes, rather than the names of particular shippers.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	17
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Arizona Grocery Co. v. *Atchison, T. & S.F. Ry.*, 284 U.S. 370 (1932)	10
Burlington Northern, Inc. v. *United States*, 459 U.S. 131 (1982)	6, 12
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	13
Customer Account Number, Special Tariff Authority (STA) No. 86-470 (Feb. 5, 1986)	3
Customer Account Numbers, STA No. 94-9406 (Feb. 13, 1985)	16
Friedman Bag Co. v. *Max C. Pope*, No. 40599 (I.C.C. May 22, 1992)	12
Genstar Chem. Ltd. v. *ICC*, 665 F.2d 1304 (D.C. Cir. 1981), cert. denied, 456 U.S. 905 (1982)	12
ICC v. *American Trucking Ass'ns, Inc.*, 467 U.S. 354 (1984)	10, 12
ICC v. *Lifschultz Fast Freight Corp.*, 151 B.R. 150 (N.D. Ill. 1993)	10
Magnolia Provision Co. v. *Beaumont, S.L.&W. Ry.*, 20 F.2d 834 (S.D. Tex. 1927), aff'd, 26 F.2d 72 (5th Cir.), cert. denied, 278 U.S. 620 (1928)	10
Maislin Indus., U.S., Inc. v. *Primary Steel, Inc.*, 497 U.S. 116 (1990)	5, 8, 9, 10, 12
Milne Truck Lines, Inc. v. *Makita U.S.A., Inc.*, 970 F.2d 564 (9th Cir. 1992)	12

Cases—Constinued: Page

National R.R. Passenger Corp. v. *Boston & Maine Corp.*, 112 S. Ct. 1394 (1992) 13
Outstanding Relief for "Shipper Account Codes" —Individual Motor Common Carriers and Freight Forwarders, STA No. 86-639 (Apr. 29, 1986) 3, 16
Pennsylvania R.R. v. *International Coal Mining Co.*, 230 U.S. 184 (1913) 8-9
Petition for Declaratory Order—Discounts and Customer Account Codes, 8 I.C.C.2d 47 (1991) ..3, 15, 16
Rates for a Named Shipper or Receiver, 367 I.C.C. 959 (1984) 3, 14
Rebel Motor Freight, Inc. v. *ICC*, 971 F.2d 1288 (6th Cir. 1992) 9
Reconsideration of Special Tariff Authorities Authorizing the Publication of Customer Account Codes in Tariffs, No. 40888 (I.C.C. Jan. 5, 1993) 16, 1a
Regular Common Carrier Conference v. *United States*, 793 F.2d 376 (D.C. Cir. 1986) 10, 15
Reiter v. *Cooper*, 113 S. Ct. 1213 (1993) 9
RTC Transp., Inc. v. *Conagra Poultry Co.*, 971 F.2d 368 (9th Cir. 1992) 12
United States v. *Chicago & Alton Ry.*, 148 F. 646 (N.D. Ill. 1906), aff'd, 156 F. 558 (7th Cir. 1907), aff'd, 212 U.S. 563 (1909) 15, 16
United States v. *Chicago Heights Trucking Co.*, 310 U.S. 344 (1940) 14

Constitution and statutes:

U.S. Const. Art. III 5
Hobbs Act:
28 U.S.C. 2321 17
28 U.S.C. 2342 17
Interstate Commerce Act, 49 U.S.C. 10101 *et seq.*:
49 U.S.C. 10741(a) 14
49 U.S.C. 10741(b) 14
49 U.S.C. 10761 ..... 2, 9
49 U.S.C. 10761(a) 7, 8

Statutes—Continued: Page

49 U.S.C. 10762 9
49 U.S.C. 10762(a) 7
49 U.S.C. 10762(a)(1) 2, 9, 13
49 U.S.C. 10762(b) 8
49 U.S.C. 10762(b)(1) 2, 13
49 U.S.C. 10762(b)(1)(A) 13
49 U.S.C. 10762(b)(1)(D) 13
49 U.S.C. 10762(b)(1)(E) 13
49 U.S.C. 11902-11904 8
49 U.S.C. 11903 8
49 U.S.C. 11916 8

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1725

LEONARD L. GUMPORT, CHAPTER 7 TRUSTEE OF THE BANKRUPTCY ESTATE OF TRANSCON LINES, CROSS-PETITIONER

v.

INTERSTATE COMMERCE COMMISSION

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE CROSS-RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App.[1] 1a-27a, is reported at 981 F.2d 402. The amendment to the opinion filed on April 5, 1992, and the opinion concurring in the denial of rehearing, Cross-Pet. App. 4a-8a, are not yet reported. The opinion of the district court, Pet. App. 31a-59a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1992. Petitions for rehearing were denied on November 25 and April 5, 1992. Pet. App.

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[1] "Pet. App." refers to the appendix to the petition in No. 92-1547.

60a; Cross-Pet. App. 5a. On February 16, 1993, Justice O'Connor extended the time for the Interstate Commerce Commission (ICC or Commission) to file a petition for a writ of certiorari to and including March 25, 1993, and the petition was filed on March 23, 1993. The cross-petition for a writ of certiorari was filed on April 23, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Cross-petitioner is the trustee for a bankrupt motor common carrier, Transcon Lines. It seeks review of the court of appeals' holding that the motor carrier and its trustee lack standing to attack the adequacy of publication under the Interstate Commerce Act (Act) of the carrier's filed tariffs.[2]

1. Under the Act, motor common carriers must charge shipping rates that are published in tariffs filed with the ICC. 49 U.S.C. 10761, 10762(a)(1). With respect to the contents of the tariffs, the Act provides:

> A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle. The Commission may prescribe other information that motor common carriers shall include in their tariffs. * * *

49 U.S.C. 10762(a)(1). The Commission is also to "prescribe the form and manner of publishing, filing, and keeping tariffs open for public inspection under this section." 49 U.S.C. 10762(b)(1).

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[2] The ICC's petition for a writ of certiorari in No. 92-1547 contains a detailed statement of the facts in this case. This brief in opposition will address the additional facts that are pertinent to the cross-petition.

In 1984, the Commission ruled that a motor carrier's publication of rates for individual shippers does not constitute per se discrimination under the Act. *Rates for a Named Shipper or Receiver*, 367 I.C.C. 959 (1984) (*Named Shipper*). Thereafter, the ICC received and granted numerous requests by carriers to identify rates applicable to particular shippers by account code, rather than by name.[3] In 1986, the Commission sua sponte issued blanket authorization for the trucking industry to publish rates by shipper code. *Outstanding Relief for "Shipper Account Codes"—Individual Motor Common Carriers and Freight Forwarders*, STA No. 86-639 (Apr. 29, 1986) (*Outstanding Relief*). The prevalence in the trucking industry of shipper-coded tariffs led to a formal challenge by certain carriers (not including Transcon) to the lawfulness of such tariffs. In *Petition for Declaratory Order—Discounts and Customer Account Codes*, 8 I.C.C.2d 47, 53 (1991) (*Customer Account Codes*), the Commission concluded that "[t]here is nothing in law or policy that establishes a wholesale prohibition from publication of tariffs that do not include direct shipper identifications." No party sought judicial review either of that decision or of any other Commission decisions approving the use of shipper-coded tariffs.

2. This case involves a civil action brought by the ICC to enjoin cross-petitioner from attempting to collect additional freight charges from shippers in violation of the ICC's credit regulations. The district

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[3] Transcon Lines requested and received permission in 1986 to publish rates by shipper code in order to "facilitate computerization * * *, thus enhancing accuracy, improving efficiency and reducing costs." *Customer Account Number*, Special Tariff Authority (STA) No. 86-470 (Feb. 5, 1986).

court granted summary judgment in favor of cross-petitioner on two alternative grounds. First, the court ruled that cross-petitioner was entitled to collect the additional charges set forth in Transcon's filed tariffs, without regard to whether the collection of those charges violated the ICC's credit regulations. Second, the district court accepted cross-petitioner's alternative argument that Transcon's discount tariffs were invalid because the tariffs identified the shippers to whom the rates applied by account-code number rather than by name. Pet. App. 45a-47a, 54a.

The district court did not determine what rates cross-petitioner could collect in light of its holding that the coded rates were invalid. Cross-petitioner, however, interpreted the judgment as stating that the only rates in effect were Transcon's bureau rates.[4] Cross-petitioner then sought to collect those higher, bureau rates from shippers who had previously received discounts under the coded tariffs. Pet. App. 21a.

3. The court of appeals affirmed the district court's judgment denying the ICC an injunction to enforce its credit regulations. Pet. App. 16a-21a, 27a. That holding is the subject of the ICC's petition for a writ of certiorari in No. 92-1547.

The court of appeals also reversed the portion of the district court's decision invalidating Transcon's shipper-coded discount tariffs. The court held that

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[4] As we explain in our petition in No. 92-1547, Pet. 3 & n.2, Transcon had several tariffs on file with the ICC setting forth tiers of rates. The highest rates were those contained in the collectively set bureau tariffs; lower rates were set forth in Transcon's discount tariffs, most of which were published using shipper-account codes. See Pet. App. 4a-5a.

cross-petitioner lacks standing to challenge the validity of Transcon's filed tariffs. Pet. App. 21a-27a; Cross-Pet. App. 4a-5a. The court found that, under the Act, neither a carrier nor its trustee can contest the lawfulness of the tariffs that the carrier filed with the Commission. Pet. App. 22a-23a.

First, the court stated that, while a carrier has standing to argue that the rate that it charged a shipper is not a filed rate, and therefore is not a "legal" rate under the Act, Pet. App. 22a, citing *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990), "it is another matter for a carrier to challenge the lawfulness of its own filed rates" Pet. App. 22a. The court explained that a federal court "has no power to declare a filed rate unlawful and award damages to a carrier for the past application of the rate by the carrier." *Ibid.* Because the unavailability of such a remedy means that the court has no power to award cross-petitioner any "effective relief for the unlawfulness [it] allege[s]," the court of appeals concluded that cross-petitioner failed to satisfy the requirement under Article III of the Constitution that a litigant present a claim that is capable of being redressed by the relief requested. *Id.* at 23a. The court also rejected the suggestion that the trustee could "fit into the overshoes of the bankrupt's creditors" in order to "challenge rates Transcon has filed in an effort to collect higher rates." *Id.* at 23a-24a.

Second, the court of appeals concluded that cross-petitioner failed to satisfy the prudential standing requirement of asserting a claim that is within the zone of interests protected by the relevant provisions of the Act. Pet. App. 24a-25a. "The publication requirement of the statute is designed to protect ship-

pers against discrimination and to protect carriers against the competitive disadvantage they may suffer if other carriers discriminate. It is not designed to allow carriers, or their successors in bankruptcy, to repudiate their own filed rates in hopes of collecting a higher rate." *Id.* at 24a. The court of appeals stated that, "[t]o permit such a process would be to stand the [Act] on its head and give federal courts an authority over rates" that the courts lack. *Id.* at 25a, citing *Burlington Northern, Inc.* v. *United States*, 459 U.S. 131, 140 (1982); Cross-Pet. App. 4a.[5]

In light of its holding on the coded-rates issue, the court of appeals remanded the case to the district court for entry of an injunction against cross-petitioner that would enjoin it from collecting any amounts from Transcon's former customers based upon the alleged "unlawfulness of coded rates or the unlawfulness of individual discount rates." Pet. App. 27a.

---

[5] The quoted sentence, and the paragraph in which it appears, was included in the court of appeals' initial opinion. Pet. App. 25a. That paragraph was deleted by the court's December 10, 1992, amendment of its opinion, *id.* at 29a, but was restored by the court's April 5, 1993, amendment of its opinion. Cross-Pet. App. 4a-5a. On the same date, the panel denied the petition for rehearing and the full court rejected the suggestion for rehearing en banc. Judge Norris filed a concurrence in those denials, explaining why "the Trustee's attempt to establish standing by casting its challenge as one to the legality, rather than the lawfulness, of Transcon's rates" also fails. *Id.* at 6a. Judge Norris stated that, because "it is the Commission that has sole discretion to craft an appropriate remedy when the rates on file do not themselves comport with the law," *id.* at 7a, federal courts cannot resolve the legality of coded rates in the context of this case. *Id.* at 7a-8a.

ARGUMENT

The cross-petition raises no issue warranting this Court's review. The court of appeals' holding that cross-petitioner lacks standing to challenge the carrier's filed discount tariffs is correct and does not conflict with the decision of any other court of appeals or any decision of this Court. Even if cross-petitioner had standing to challenge Transcon's use of shipper-account codes in its discount tariffs, the challenge lacks merit. The Commission has broad authority to determine the contents of tariffs and has reasonably determined that the filing of shipper-account codes in tariffs is permissible. Moreover, neither cross-petitioner nor any other party sought judicial review of the Commission decisions announcing that policy, and cross-petitioner cannot mount a collateral challenge to that policy here. Finally, the significance of cross-petitioner's claim is limited by virtue of the ICC's recent decision to reconsider whether to retain, modify, or eliminate its authorization for the filing of tariff rates containing shipper codes. Accordingly, the cross-petition should be denied.

1. Cross-petitioner contends (Cross-Pet. 8-9, 20-21) that the court of appeals erred in concluding that it lacks standing to claim that Transcon's use of shipper-account codes in its filed discount tariffs renders those tariffs illegal. In cross-petitioner's view, a claim that the tariffs illegally failed to reveal the identities of particular shippers is equivalent to a claim that the discount rates were not "filed" rates at all within the scope of 49 U.S.C. 10761(a) and 10762(a), and it concludes that such a claim may be raised by a carrier or bankruptcy trustee under this

Court's decision in *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, *supra*. That analysis is incorrect.

The Act requires motor common carriers to file tariffs setting forth their charges for all transportation services and to collect only the rates published in their filed tariffs 49 U.S.C. 10761(a), 10762(b). Deviation from the filed rate may result in the imposition of civil or criminal sanctions on the carrier or shipper. See 49 U.S.C. 11902-11904. A trustee, receiver, or employee of a corporation that is subject to the jurisdiction of the ICC must file and publish its tariffs and thereafter "observe those tariffs until changed under law." 49 U.S.C. 11903. The Act is inconsistent with an attempt to evade those requirements on the basis that a carrier's filed rate was not "legal." Pursuant to 49 U.S.C. 11916:

> When a carrier files wtih the Interstate Commerce Commission or publishes a particular rate * * * the published or filed rate is conclusive proof against that carrier, its officers, and agents that it is the legal rate for that transportation or service in a proceeding begun under section 11902 or 11903 of this title. A departure, or offer to depart, from that rate is a violation of those sections.

In light of those provisions, the court of appeals correctly ruled that nothing in the Act supports cross-petitioner's attempt to treat Transcon's filed tariffs as void because they contained shipper-account codes. Transcon filed the shipper-account code tariffs with the Commission, after specifically requesting and receiving ICC approval to do so. See note 3, *supra*. Traffic moved under those tariffs, and the tariffs were never "changed under law," 49 U.S.C. 11903. Transcon's trustee cannot now unilaterally disavow those tariffs, and retroactively seek to rebill

shippers for higher amounts. Cf. *Pennsylvania R.R. v. International Coal Mining Co.*, 230 U.S. 184, 197 (1913).

Contrary to cross-petitioner's claims (Cross-Pet. 6, 19-21), nothing in the court of appeals' analysis conflicts with *Maislin*. In that case, citing the Act's requirements that carriers must file their rates in tariffs and shippers must pay the filed rates, 49 U.S.C. 10761, 10762, the Court held that the ICC was precluded from making a negotiated rate the applicable rate, rather than requiring application of the filed tariff rate. 497 U.S. at 126-133. This case is quite different, because the discount rate that Transcon originally charged *is* a filed rate. See *Rebel Motor Freight, Inc. v. ICC*, 971 F.2d 1288, 1294 (6th Cir. 1992) (recognizing that *Maislin* is inapplicable where the rate applied is a filed rate). *Maislin* holds that adherence to the filed rate is "utterly central" to the administration of the Act. 497 U.S. at 132. In *Reiter v. Cooper*, 113 S. Ct. 1213, 1221 (1993), the Court reaffirmed that "tariff rates not disapproved by the ICC are legal rates, binding on both the shipper and the carrier." Under *Maislin*, the trustee can insist upon collecting a filed rate rather than a negotiated one; but it cannot claim a right to invalidate Transcon's discount tariffs in order to collect rates under Transcon's higher, bureau tariffs.

It would contradict the premise of the filed rate doctrine to permit a carrier to publish and collect one rate and later demand a higher rate on the theory that its own filing was a nullity. Under the Act, motor common carriers are responsible for setting the rates they publish and file with the ICC. 49 U.S.C. 10762(a)(1). Shippers are entitled to rely upon the rates published in a carrier's tariff. To prevent the filed rate doctrine from being undermined,

other courts faced with similar issues have reached the same conclusion as the court of appeals did here and have held that a carrier lacks standing to repudiate its own tariff.[6] No court of appeals has ever agreed with the trustee's theory.[7]

The trustee is not assisted by casting his challenge as one to the "legality" as well as "lawfulness" of Transcon's shipper-coded tariff rates. Cross-Pet. 8-9, 14, 20. Under the Act, unless the Commission rejects or suspends a proposed tariff in advance, the rate specified therein is the "legal" rate and the only rate that a carrier may charge (and that a shipper may pay) for common carriage unless and until that rate is set aside by the ICC as unreasonable or otherwise unlawful. *Maislin*, 497 U.S. at 128-129, quoting *Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry.*, 284 U.S. 370, 384 (1932); *ICC* v. *American Trucking Ass'ns, Inc.*, 467 U.S. 354, 360 n.4 (1984). Thus, as

---

[6] See *Magnolia Provision Co.* v. *Beaumont, S.L.&W. Ry.*, 20 F.2d 384, 385 (S.D. Tex. 1927) ("It would be intolerable if a carrier could file with the Commission and cause to be published a rate, and then avoid its effect * * * by claiming either that it had violated * * * the law, or that it had failed in some technical requirement."), aff'd, 26 F.2d 72 (5th Cir.), cert. denied, 278 U.S. 620 (1928); *ICC* v. *Lifschultz Fast Freight Corp.*, 151 B.R. 150, 152-153 (N.D. Ill. 1993) (following the court of appeals' decision here with respect to the standing issue).

[7] Cross-petitioner errs (Cross-Pet. 6 n.6) in relying on decisions such as *Regular Common Carrier Conference* v. *United States*, 793 F.2d 376 (D.C. Cir. 1986). While that case and others have noted that publication is intended to benefit carriers as well as shippers, and have therefore allowed challenges to ICC publication policies at the behest of carriers, the carriers to which those decisions refer are not the publishing carrier but its competitors.

the court of appeals recognized, "an attack on the 'legality' of a rate means an allegation that the rate is not a *filed* rate." Pet. App. 22a. It is undisputed that Transcon submitted its shipper-account-code tariffs to the ICC and that those tariffs were placed in the Commission's public tariff files. Thus, these tariffs were filed with the ICC and, under *Maislin* and *Arizona Grocery*, contain the "legal" rates for the traffic covered by them.

Federal courts have no authority to determine that part of Transcon's tariffs are not properly published and that some other part of those tariffs therefore should govern shipments, including shipments made years earlier. As Judge Norris explained in his opinion concurring in the denial of rehearing (Cross-Pet. App. 6a-7a):

> [The court] cannot reach the question [of the legality of coded rates]. For if coded rates are not duly filed and published rates, then to the extent Transcon's rates were coded, they were not filed. That is, for shipments subject to discount because payment was made within 90 days, Transcon had no rates on file, and thus no basis for collecting undercharges. * * *
>
> In an attempt to establish an alternative filed rate for these shipments, the Trustee urges us to disaggregate Transcon's filing. He argues that, once the coded discounts are stricken, the filed rate is simply the bureau rate. But the bureau rate is only part of the filed rate. For shippers who pay within 90 days, the filed rate, if one exists, is the bureau rate less the discounts. We cannot strike the discounts and enforce the undiscounted bureau rates in their stead.

Judge Norris correctly concluded, *id.* at 7a, that the Commission has "sole discretion to craft an appropriate remedy when the rates on file do not themselves comport with the law." See *Maislin*, 497 U.S. at 133, citing *ICC* v. *American Trucking Assn's, Inc.*, 467 U.S. at 364-365; *Burlington Northern*, 459 U.S. at 142-143 (judicial invalidation of a rate does not revive a prior rate unless the Commission so determines); see also *Genstar Chem. Ltd.* v. *ICC*, 665 F.2d 1304, 1308 (D.C. Cir. 1981) (ICC has discretion to determine that the remedy for "any unlawfulness or irregularity" in published tariff rate charged to a shipper is measured not by a different tariff rate, but by the harm flowing from the unlawfulness or irregularity), cert. denied, 456 U.S. 905 (1982). Cross-petitioner provides no basis for carving out an exception from that settled rule so as to permit courts to review and reform its tariffs.[8]

2. Even if cross-petitioner had standing to challenge Transcon's filed rates, the claim that a published tariff is void under the Act if it fails to identify the shipper to whom the rate applies would not

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[8] Neither of the two decisions cited by cross-petitioner (Cross-Pet. 21 n.16) supports the view that courts can strike down part of a tariff and then enforce the remainder, as Judge Norris explained, Cross-Pet. App. 7a-8a. *Friedman Bag Co.* v. *Max C. Pope*, No. 40599 (I.C.C. May 22, 1992), recognizes that when the allegedly filed rate asserted by the carrier does not apply to the shipment at issue, the carrier may collect any other filed rate that is both applicable and reasonable. *Milne Truck Lines, Inc.* v. *Makita U.S.A., Inc.*, 970 F.2d 564, 568 (9th Cir. 1992), applied the filed rate rather than a negotiated one. The Ninth Circuit subsequently explained the difference between *Milne* and the issue in this case. See *RTC Transp., Inc.* v. *Conagra Poultry Co.*, 971 F.2d 368, 371 (1992) (per curiam).

warrant this Court's review. The Act does not specifically require that shippers' names be published. While the Act specifies certain requirements that tariffs must have, including publication of "rates," 49 U.S.C. 10762(a)(1), disclosure of the names of shippers is not specifically mandated. Rather, the Act states that the Commission "may require other information" to be published, 49 U.S.C. 10762(a)(1), and gives the Commission the responsibility to "prescribe the form and manner of publishing, filing, and keeping * * * open for public inspection" motor carrier tariffs.[9] 49 U.S.C. 10762(b)(1).

In the absence of any precise statutory requirement that shippers be named, the agency is entitled to make a reasonable determination of whether the use of shipper-account codes constitutes adequate tariff publication. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984). "If the agency interpretation is not in conflict with the plain language of the statute, deference is due." *National R.R. Passenger Corp.* v. *Boston & Maine Corp*, 112 S. Ct. 1394, 1401 (1992). The Commission has reasonably determined that identification of the shipper by name is not an indispensable requirement of publication in the motor carrier industry.

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[9] The Act does particularize tariff requirements in other contexts. For instance, with respect to railroad tariffs, the Act states that the tariffs must disclose the "specific charges" and "identify plainly" the points between which freight will be shipped, the privileges given and facilities allowed, and any rules that change, affect, or determine the published rate. 49 U.S.C. 10762(b)(1)(A), (D), (E). The absence of a similar requirement as to publication of shipper names, for either railroad or motor carrier tariffs, cuts against the implication of such a rule.

Identification of shipper names is not inherently necessary to serve the underlying purpose of the tariff publication system of preventing unreasonable discrimination. Shippers who watch the tariffs can generally identify particular routes, commodities, and conditions of transportation without the name of the particular shipper involved. To that extent, requiring publication of shipper names is not essential.[10] On the other hand, the use of shipper codes, which is now common in motor carrier tariffs, serves the beneficial purpose of facilitating computerized billing and record keeping. Accordingly, the Commission, since the matter was first presented to it

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[10] The underlying premise of cross-petitioner's objection to shipper codes appears to be its criticism (Cross-Pet. 9-14) of the Commission's allowance of rates for individual shippers. That criticism, however, has no relevance to the cross-petition's challenge to the *coding* of such rates, which is the only question presented (apart from standing). Cross-Pet. i; *id.* at 22 (seeking a remand requiring the court of appeals only to decide the "legality" of the use of shipper-codes). In any event, rates for individual shippers are not automatically discriminatory. The Act does not require all shippers to be treated identically; it prohibits "unreasonable discrimination." 49 U.S.C. 10741(b). With respect to motor common carrier rates, "unreasonable" discrimination is charging or receiving different compensation "for performing a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances." 49 U.S.C. 10741(a). Rate and service differences are not unlawful if they are based on differing transportation circumstances. Because carriers and shippers may have unique requirements, carriers may establish rates for particular shippers, and the issue of unreasonable discrimination must be determined on a case-by-case basis. See *Named Shipper*, 367 I.C.C. at 962-963. That determination is for the Commission to make. *United States* v. *Chicago Heights Trucking Co.*, 310 U.S. 344, 352-353 (1940).

in 1985, has consistently concluded that the name of the shipper to whom a rate applies is not a necessary tariff component. See *Customer Account Codes*, 8 I.C.C.2d 47, 54 (1991).[11]

None of the authorities cited by cross-petitioner suggests that the ICC's interpretation is impermissible under *Chevron*. In *Regular Common Carrier Conference* v. *United States*, 793 F.2d 376 (D.C. Cir. 1986) (Cross-Pet. 14 n.13), the court rejected a rate-averaging tariff provision and held that a tariff must show, for the benefit of competing carriers and competitors of the shipper, how the rate is calculated.[12] Here, all of the information needed to determine Transcon's rates is contained in the relevant tariffs. Nor are Commission decisions setting requirements for location codes (Cross-Pet. 18-19) relevant to the issues in this case. And, while the district court in *United States* v. *Chicago & Alton Ry.*, 148 F. 646, 648 (N.D. Ill. 1906), aff'd on other grounds, 156 F. 558 (7th Cir. 1907), aff'd, 212 U.S. 563 (1909) (Cross-Pet. 14, n.13), addressed publication issues, that decision was affirmed on a different ground, with the court of appeals stating that the "matter

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[11] That the Commission's Office of Compliance and Consumer Assistance (OCCA) argued a different position to the agency (Cross-Pet. 13-14) does not undermine the Commission's determination, nor impede OCCA's duty to enforce the statute as interpreted by the Commission. If anything, it demonstrates that the concerns raised by the trustee in these proceedings were fully presented to the Commission before it reached its contrary conclusion.

[12] Likewise, the Commission cases cited by cross-petitioner (Cross-Pet. 17-18) hold only that motor carrier tariffs must set forth the rate to be charged or the formula for determining how the rates will be calculated.

of publication has nothing to do with the case." 156 F. at 560.

In addition to lacking merit, cross-petitioner's challenge to the ICC's approval of shipper-account codes constitutes an improper collateral attack. As indicated above, in 1984 the ICC ruled in *Named Shipper* that tariffs may be limited to individual named shippers. In 1985 it authorized one carrier to publish rates by shipper code. *Customer Account Numbers*, STA No. 94-9406 (Feb. 13, 1985). In 1986 it granted permission to Transcon, see note 3, *supra*, and later to all carriers, *Outstanding Relief*, *supra*, to publish rates by shipper-account code. Finally, in 1991 it rejected a general challenge under the Act to the use of shipper codes in motor-carrier tariffs. *Customer Account Codes*, *supra*. Neither Transcon nor any other party sought review of those decisions, with the result that the industry and shippers have relied on them for nearly a decade. Cross-petitioner cannot challenge those decisions now, years after they were rendered, in the context of this ICC enforcement action.

Finally, the significance of cross-petitioner's challenge to shipper-code tariff rates is limited by the ICC's recent decision to reconsider whether to retain, modify, or eliminate its authorization for the filing of rates using shipper codes.[13] The trustee, and any other parties who are genuinely concerned about the use of shipper codes, have had the opportunity to participate in that proceeding before the Commission. And, of course, judicial review of the Commission's

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[13] *Reconsideration of Special Tariff Authorities Authorizing the Publication of Customer Account Codes in Tariffs*, No. 40888 (I.C.C. Jan. 5, 1993). We have reprinted the ICC's order in the appendix to this brief, *infra*.

final decision will be available under the Hobbs Act. 28 U.S.C. 2321, 2342. This Court's consideration of the issues raised by the cross-petition would therefore be premature.

CONCLUSION

The cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1993

APPENDIX

INTERSTATE COMMERCE COMMISSION

DECISION

No. 40888

Service Date January 5, 1993

RECONSIDERATION OF SPECIAL TARIFF AUTHORITIES AUTHORIZING THE PUBLICATION OF CUSTOMER ACCOUNT CODES IN TARIFFS

AGENCY:

INTERSTATE COMMERCE COMMISSION.

ACTION:

Notice of Proposal to reconsider outstanding Special Tariff Authorities.

SUMMARY:

The Interstate Commerce Commission plans to reconsider all outstanding Special Tariff Authorities that allow carriers to publish tariff rates for shippers identified only through the means of account codes listed in the tariffs. Questions have been raised regarding whether the publication of rates in this manner complies with the rate disclosure requirements of the Interstate Commerce Act, and Congress has requested the Commission to initiate a proceeding to consider the matter. After consideration of

the comments received and the issues involved, the Commission expects to determine whether the Special Tariff Authorities should be continued, modified or revoked.

DATES:

Comments are due on March 8, 1993.

ADDRESSES:

Send comments (an original and 10 copies) referring to Docket No. 40888 to:

Interstate Commerce Commission
Office of the Secretary
Case Control Branch
Washington, D.C 20423

FOR FURTHER INFORMATION CONTACT:

James W. Greene (202) 927-5597

or

Ronald A. Hall (202) 927-5595

[TDD for hearing impaired (202) 927-5721]

SUPPLEMENTARY INFORMATION:

On January 30, 1985, the Commission approved a motor carrier's request to restrict the application of tariff rates to specific customers by the use of unique customer code numbers.[1] The reason advanced by the carrier in support of its request was primarily to facilitate the computerization of rating and billing processes. Subsequently, numerous similar authorizations were granted to other motor and water car-

[1] Special Tariff Authority No. 84-9406.

riers, and, on April 29, 1986, the Commission's Suspension/Special Permission Board, acting on its own motion, granted a Special Tariff Authority [2] which allowed all motor carriers and freight forwarders to make use of shipper account codes in tariffs filed by them or on their behalf. (A complete listing of all outstanding Special Tariff Authorities allowing the publication of shipper codes is contained in Appendix A.)

The Commission again addressed the issue of customer account codes in *Pet. for Declar. Order-Discounts and Customer Acct. Codes*, 8 I.C.C.2d 47 (1991). In that proceeding, the Commission declined to find customer account code tariffs unlawful, *per se*, but indicated its willingness to consider such tariffs on a case-by-case basis. As the Commission there stated (8 I.C.C.2d at 54):

> If a tariff lacks any of the essential information concerning the commodities, service points, and rate information, it is not the use of a customer code that would invalidate the tariff. Conversely, mere use of shipper codes does not mean necessarily that the tariff lacks any necessary information. [footnote omitted]

Based on Congress' request that we do so,[3] we are instituting this proceeding to reconsider whether the Special Tariff Authorities that allow carriers to publish tariff rates for shippers identified only through

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[2] Special Tariff Authority 86-639, amended April 29, 1986, to provide for numerical and/or alphabetical codes.

[3] Senate Report No. 102-351, dated July 30, 1992, and accompanying the U.S. Department of Transportation and Related Agencies Appropriations Bill, 1993.

the means of account codes should be continued, modified, or revoked.

Comments are invited from interested parties regarding the lawfulness of publishing rates through the use of shipper account codes that are not explained in the rates tariff or in a governing tariff. Comments are also invited as to whether the Commission should continue or revoke the existing Special Tariff Authorities, the likely impact of such action, and any modifications the Commission should consider with respect to such Authorities. We are well aware that shipper codes may be used in connection with other methods of tariff publication which are alleged to fail the disclosure requirements such as the range and trigger tariff provisions being considered in Docket Nom. 40887, *Range Tariffs of All Motors Common Carriers—Show Cause Proceeding*, show cause order served concurrently with the notice here. Parties are requested to limit their comments in this proceeding to the question of whether a tariff that in all other respects satisfies disclosure requirements should be deemed to be invalid simply because it is published utilizing undisclosed shipper codes.

Decided: December 23, 1992.

By the Commission, Chairman Philbin, Vice Chairman McDonald, Commissioners Simmons and Phillips.

Sidney L. Strickland, Jr.
Secretary

(SEAL)

[Appendix omitted]

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No. 92-1725

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LEONARD L. GUMPORT, Chapter 7 Trustee of the Bankruptcy Estate of Transcon Lines, Cross-Petitioner,

v.

INTERSTATE COMMERCE COMMISSION, Cross-Respondent.

On Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC. AND HEALTH AND PERSONAL CARE DISTRIBUTION CONFERENCE, INC. AS AMICI CURIAE IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

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IN THE

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v.

INTERSTATE COMMERCE COMMISSION, Cross-Respondent.

MOTION OF NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC. AND HEALTH AND PERSONAL CARE DISTRIBUTION CONFERENCE, INC. FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

National Small Shipments Traffic Conference, Inc. and Health and Personal Care Distribution Conference, Inc. ("Shipper Conferences") are nonprofit membership corporations with more than 500 shipper members, including individuals, small companies and major corporations. The Shipper Conferences have for many decades actively represented their members' interests as shippers of freight before the Interstate Commerce Commission and in the federal courts. As customers of the trucking industry, the Conferences' members are besieged by undercharge actions aggressively framed by trustees of bankrupt motor carriers.

The Shipper Conferences previously filed a brief as *amici curiae* supporting the ICC's petition for writ of certiorari in the companion case to this case, No. 92-1547, *Interstate Commerce Commission v. Transcon Lines*. That brief was filed April 22,

1993 with the written consent of the ICC and United States and of Leonard L. Gumport, Trustee for Transcon Lines. The ICC and United States have also provided written consent to the Shipper Conferences' brief in this case. Transcon, Cross-Petitioner in this case, has refused consent this time, expressing displeasure with these Shipper Conferences' prior brief on the ICC credit rules issue.

That brief, and this one, should come as no surprise to Transcon, which consented to participation by the Shipper Conferences as *amici curiae* in the case below. These Conferences took similar positions before the Ninth Circuit, and the undersigned not only participated in the oral argument alongside counsel for the ICC, but addressed the precise issue Transcon seeks to raise before this Court, *viz.*, the issue of whether carriers are bound by tariffs they file using customer account codes to identify shippers.

Even prior to the litigation below, the Shipper Conferences had demonstrated an interest in these issues. The Conferences participated actively in proceedings before the ICC leading to several of the decisions discussed in the Cross-Petition, including *Rates for a Named Shipper or Receiver*, 367 I.C.C. 959 (1984), and *Petition for a Declaratory Order — Discounts and Customer Account Codes*, 8 I.C.C. 2d 47 (1991), which are discussed in detail. The Conferences also filed briefs *amici curiae* in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990) and *Reiter v. Cooper*, ___U.S.___, 113 S.Ct. 1213 (1993).

Many shipper members of the Conferences have been named as defendants in numerous undercharge cases asserting the same theory of recovery as to which review is sought in the Cross-Petition in this case. The interest of the Shipper Conferences in this case is undeniable.

The Shipper Conferences bring to this case a wealth of experience as participants in relevant ICC proceedings and court

cases, including the case below. They also represent hundreds of shippers who make use, on a daily basis, of carrier tariffs like those Transcon seeks to repudiate, and have paid computer-coded tariff rates to hundreds of motor carriers, both solvent and bankrupt, for many years. The Shipper Conferences are therefore able to discuss the practical implications, of which the ICC has no direct experience, of the industry's adoption of computerized customer account coded tariffs, which have become quite common since the ICC's 1986 decision granting carrier requests to use customer account codes. Regardless of what the Commission may ultimately decide about issues of lawfulness, shippers *must* be able to rely on the legality of the tariff rates under which they choose to ship their freight.

Transcon's Cross-Petition meets *none* of the accepted tests for review by this Court. Its attempt to create a new exception to the filed rate doctrine based on a carrier's assault on the legality of its own filed tariff rates, which was rejected in the decision below, finds no support in decisions of this Court or any court of appeals, and is contrary to the express provisions of the Interstate Commerce Act. See 49 U.S.C. § 11916. However, the pendency of Transcon's Cross-Petition is being used as a basis for continued pursuit of this specious legal theory, to the direct injury of the Shipper Conferences' members.

For the foregoing reasons, the Shipper Conferences should be given leave to file the accompanying brief.

Respectfully submitted,

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Dated: May 24, 1993

TABLE OF CONTENTS

	Page
I. INTEREST OF AMICI	1
II. STATEMENT	2
A. The Motor Carrier Act of 1980 Has Produced the Competitive Rates Congress Intended	3
B. Customer Account Codes in Carrier Tariffs	5
C. Discount Tariffs And The Undercharge Epidemic	8
III. REASONS FOR DENYING THE WRIT . . .	9
A. Transcon Has Misread the Decision Below, Misread *Maislin* and Misread The Act . . .	9
B. Transcon's Disagreement With The ICC's Interpretation Of The Motor Carrier Act of 1980 Does Not Permit It To Ignore Its Own Filed Tariffs	12
IV. CONCLUSION	15
APPENDIX	

TABLE OF AUTHORITIES

Cases	Page
Burlington Northern, Inc. v. United States, 459 U.S. 131 (1982)	14
Genstar Chemical Ltd. v. ICC, 665 F.2d 1304 (D.C. Cir. 1981) *cert. denied*, 456 U.S. 905 (1982)	14
Investigation into Motor Carrier Collective Ratemaking and Related Practices, 7 I.C.C. 2d 388 (1991)	4
Lawfulness of Volume Discount Rates by Motor Carriers of Property, 365 I.C.C. 711 (1982)	8
Magnolia Provision Co. v. Beaumont, S. L. & W. Ry. Co., 20 F.2d 384 (S.D. Tex. 1927), *aff d.* 26 F.2d 72 (5th Cir.), *cert. denied*, 278 U.S. 620 (1928)	13
Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116 (1990)	3, 11
Nueces County Navigation District No. 1 v. Abilene & S. Ry. Co., 364 I.C.C. 269 (1980)	8
Rates for a Named Shipper or Receiver, 367 I.C.C. 959 (1984)	5, 7
Regular Common Carrier Conference — Petition for Declaratory Order — Range of Discounts and Customer Account Codes, 8 I.C.C. 2d 47 (1991)	6
Regular Common Carrier Conference v. United States, 793 F.2d 376 (D.C. Cir. 1986)	13

Cases **Page**

Special Tariff Authority No. 86-470, *Customer Account Number*, unpublished ICC decision dated February 5, 1986 . . . . . Appendix

Texas & P. Ry. Co. v. United States, 289 U.S. 627 (1933) 8

Statutes and Regulations

49 U.S.C. § 10101(a)(7) 3

49 U.S.C. § 10762(a)(1) 5

49 U.S.C. § 11903(b) 12

49 U.S.C. § 11916 11

No. 92-1725

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LEONARD L. GUMPORT, Chapter 7 Trustee of the Bankruptcy Estate of Transcon Lines, Cross-Petitioner,

v.

INTERSTATE COMMERCE COMMISSION, Cross-Respondent.

On Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC. AND HEALTH AND PERSONAL CARE DISTRIBUTION CONFERENCE, INC. AS AMICI CURIAE IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

I. INTEREST OF AMICI

National Small Shipments Traffic Conference, Inc. and Health and Personal Care Distribution Conference, Inc. ("Shipper Conferences") hereby submit their brief as *amici curiae* in opposition to the cross-petition for writ of certiorari filed by Leonard L. Gumport, Trustee of Transcon Lines ("Transcon"). Because Transcon refused to consent to the filing of this brief, the interest of these Shipper Conferences has been set forth in their Motion for Leave to File, *supra*.

II. STATEMENT

Prior to Transcon's inventive argument to the District Court in this case, the undercharge campaign, aggressive though it was, had been confined to claims for tariff rates where the rates originally billed and paid had not been filed with the Interstate Commerce Commission. Transcon's determination to extract additional payments from *all* of its former shippers has produced a new legal theory, by which Transcon claims the right to repudiate its own published tariffs.

Wrapping itself in the flag of discrimination (which the Act prohibits to protect *shippers*), Transcon now claims that (1) the filed discount tariffs that enabled it to attract shipper business violated the Interstate Commerce Act; (2) the ICC decisions authorizing those tariffs were wrong; and (3) its former shippers must therefore pay much higher rates, years after the fact. In other words, having entered a "guilty" plea Transcon now demands, as its proper reward, collection of millions of dollars. The Ninth Circuit was repelled by this argument, and rightly so.

What makes the Trustee's assault on the customer account coded rates so totally without merit is that Transcon's shippers had every right to rely upon those rates. Prior to publishing such rates, Transcon went before the Commission and obtained specific approval for their publication. Subsequently, in a decision issued in 1986, the Commission generally approved customer account codes for publication in tariffs by all carriers. And, in 1991, the Commission issued yet another decision reaffirming the use of these account codes.

Even in today's largely deregulated environment, these Conferences' shipper members expect to be able to rely on carrier tariffs, and on the authority of the ICC's decisions and regulations. Transcon rejects all of these, repudiating both its own discount tariffs *and* ICC decisions approving those tariffs.

Though veterans of the undercharge wars, these Shipper Conferences have never before encountered anything to match the scorched earth policy adopted by Transcon. Recognizing no barriers to its goal of attacking *all* its former shippers, Transcon has now filed a legally frivolous Cross-Petition. This Court should reject Transcon's attack on its filed tariffs now.

A. The Motor Carrier Act of 1980 Has Produced the Competitive Rates Congress Intended

Basic to Transcon's argument is its contention that, notwithstanding the Motor Carrier Act of 1980, motor carriers are required to maintain a single set of rates applicable to all shippers. In other words, it argues not only that computer-coded rate items but also all rate items which name the shipper, are both illegal and unlawful. Ultimately, Transcon is attacking the decision by Congress to promote competitively set, market-based motor carrier rates.

A number of the changes produced by the Motor Carrier Act of 1980 were noted by the Court in *Maislin Industries, U.S. Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990). The Court there recognized that the Motor Carrier Act "substantially deregulated the motor carrier industry in many ways in an effort to 'promote competitive and efficient transportation services.'" *Id.*, at 133, quoting 49 U.S.C. § 10101(a)(7). Pervasive competition quickly replaced pervasive regulation in the motor carrier industry, and freight rates quickly came to be set by market forces rather than by economic regulation, as Congress intended. Basically, the competition in the motor carrier industry is for the shipments of individual shipper customers, and carriers compete for each shipper's traffic on price, matching or bettering one another's discount rates as appropriate to the traffic of individual shippers.

Transcon's argument — that carriers are limited by statute only to publish rates applicable to all shippers — would eliminate competition for individual accounts. The result would be the lockstep rates that Congress intended to eliminate through

the 1980 Act. And a shipper which tenders hundreds of shipments to a carrier daily would be charged the same rate as a shipper tendering one shipment a year.

The uniform "class rates" collectively set by the carriers in motor carrier rate bureaus which were the norm prior to 1980 continue to exist today on paper. Those rates move little or no traffic, as they are both inflated and noncompetitive.[1] The class rates that are on file today exist as base rates for the publication of tariffs containing discounted rates set by competition for individual shippers.

Recently, the Commission conducted an exhaustive examination of motor carrier ratemaking in the post-1980 regulatory environment in *Investigation into Motor Carrier Collective Ratemaking and Related Practices*, 7 I.C.C. 2d 388 (1991), 1991 WL 106811 (I.C.C.). The Commission found that class rates now operate somewhat like inflated versions of automobile list prices. The Commission regards discounting from the collectively set class rates to produce individually set carrier-to-shipper rates as a development that advances the Congressional intent (*id.* at 411), and noted "[T]here have been no cases filed alleging unreasonable discrimination as a result of discounting practices." *Id.* at 428, n. 146.

If, as Transcon asks, this Court were to nullify or invalidate all tariff rates published under the names of individual shippers or under their account code numbers, that would eliminate all the normal competitively made rates in the tariffs and leave only the noncompetitive collectively-set class rates. Simply stated, Transcon is attacking the entire set of filed tariff rates which have been developed by Transcon and the other carriers to implement the competitive pricing objectives of the 1980 Act.

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[1] The whole point of Transcon's repudiation of its filed discount tariffs is to substitute much higher collectively-set class rates for the competitive rates at which shippers made their decision to use Transcon's services.

B. Customer Account Codes in Carrier Tariffs

The Commission has approved the motor carrier industry's move toward individual pricing since 1980. In *Rates for a Named Shipper or Receiver*, 367 I.C.C. 959 (1984), the ICC rescinded its regulation prohibiting tariffs containing rates for the account of a named shipper. In its Cross-Petition at 12, Transcon attacks this decision, arguing that it "veered sharply from this established precedent," by which Transcon means a series of railroad decisions predating even the *original* Motor Carrier Act of 1935. Transcon completely ignores the purpose of the Motor Carrier Act of 1980, on which the Commission relied in approving individualized tariff rates resulting from competition for shippers' business.

The statute does not prohibit rates for named shippers, stating only "A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle. The Commission may prescribe other information that motor common carriers shall include in their tariffs." 49 U.S.C. § 10762(a)(1). The Commission did not condone unlawful discrimination in *Rates for a Named Shipper*. It simply held that unreasonable discrimination cannot be presumed from the face of the tariff, but must be shown in an appropriate evidentiary proceeding under well established procedures. 367 I.C.C. at 963. And *none* of more than 100 parties to the proceeding challenged the Commission's conclusion that retention of its "outmoded and incorrect regulation would have a chilling effect on tariff simplification and stifle legitimate competition, contrary to the goals established for motor carriers of property by the Motor Carrier Act of 1980." 367 I.C.C. at 964.

The Commission subsequently received requests from carriers with computerized rate capability for authorization to replace shipper names in their discount tariffs with computer-compatible shipper account codes. The carriers elected to use a

number in each specific tariff item which was cross-referenced to their computerized billing system. As represented to the Commission by the carriers (including Transcon), approval of such codes was necessary to facilitate accuracy in making tariff changes, rating shipments, and issuing correct freight bills in an environment in which fast responses to competitors could make the difference between success and failure.[2] Indeed, minimizing undercharge claims to correct the original freight bills was offered as a reason for using customer account codes.

After granting many such applications by individual motor carriers, the Commission issued a blanket order authorizing customer account codes by all carriers in 1986. Again, in 1991, the Commission considered coded discount tariffs and approved them, citing essentially the same grounds on which it had previously approved rates for named shippers. *Regular Common Carrier Conference — Petition for Declaratory Order — Range of Discounts and Customer Account Codes*, 8 I.C.C. 2d 47 (1991) (1991 WL 179376 (I.C.C.)).

The Commission observed that "there is nothing in law or policy that establishes a wholesale prohibition from publication of tariffs that do not include direct shipper identifications," *id.* at 53. The Commission also rejected suggestions that customer account codes, by themselves, make tariffs fall short of applicable requirements, explaining (*id.* at 54):

> If a tariff lacks any of the essential information concerning the commodities, service points, and rate information, it is not the use of a customer code that would invalidate the tariff. Conversely, mere use of shipper codes does not mean necessarily that the tariff lacks any necessary information.

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[2] A copy of the ICC's February 5, 1986 decision approving Transcon's application for authority to use customer account codes in its tariffs is attached hereto as an Appendix.

As with *Rates for a Named Shipper*, the Commission merely permitted the use of customer account coded tariffs. Again, no party sought judicial review of the Commission's decision.

Today, it is estimated that *more than half of the freight transported by motor common carriers in the United States moves at discount rates in customer coded tariffs.* Although Transcon would have this Court believe that all such tariffs are "secret," *i.e.*, that only the carrier and the shipper know what that shipper's discount is, the reality is different. Many tariffs use alphabetically coded rates based on the shipper's name or address that are readily decipherable. There are also numerically coded discount tariffs which are successors, item by item, to earlier tariffs in the same series containing the shipper's name or address, permitting anyone who searches the tariff history to discover the discounts for individual shippers. And, typically, all the account-coded tariff items specify the commodity, the origin, the destination and the rate or discount. This is all that another shipper needs to seek similar treatment on the same commodity between the same points. But there is not now, nor was there ever, a statutory requirement to identify the shipper in a tariff rate item.

No shipper has ever challenged the use of customer account coded discount tariffs by Transcon (or any other carrier) as unreasonably discriminatory. The need for regulatory action has been displaced by the competitive option of arranging for publication of a comparable (or better) discount rate by another carrier.

In any event, if there were some defect in a carrier's use of an account code in a tariff rate item, it would not follow that the remedy for such a "violation" would be to erase the entire rate item bodily from the tariff, as Transcon seeks to do with hundreds of discount rate items. All that would be needed would be to remedy the "defect" of the account code itself. As Judge

Norris noted in his concurrence to the latest version of the Ninth Circuit's Opinion (1992 WL 465600, at p. 5):

> We would as soon invalidate only the coded restriction on who receives the discount rate, which would leave the Trustee vulnerable to shippers seeking overcharges for discounts denied because their customer numbers were not on the filed tariff. Either way, Transcon's rate filing must be reformed if the coded discounts are invalidated. But it is the Commission that has sole discretion to craft an appropriate remedy when the rates on file do not themselves comport with the law.

As the Commission took care to explain in the decisions cited above, there are well established procedures for challenging discrimination.[3] Where the requisite showing is made, the remedy is to correct the defect, not to nullify the tariff. See *Texas & P. Ry. Co. v. United States*, 289 U.S. 627, 650 (1933) and *Nueces County Navigation District No. 1 v. Abilene & S. Ry. Co.*, 364 I.C.C. 269, 276 (1980). The shippers who shipped via Transcon were entirely justified in relying on the legality and the lawfulness of the rates in Transcon's discount tariff.

C. Discount Tariffs And The Undercharge Epidemic

In view of the foregoing it should be apparent that the argument in terms of discrimination among its former shippers is merely a pretext for Transcon's unilateral repudiation of its filed discount tariffs. The real target is the discounts themselves. The motor carrier industry's practice of marketing its services

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[3] *See Lawfulness of Volume Discount Rates by Motor Common Carriers of Property*, 365 I.C.C. 711, 716 (1982): "According to well-established precedent, unreasonable discrimination under 49 U.S.C. § 10741 requires that a complaining party show disparity of rates, competitive injury and common control by the carrier over the rates charged to both the preferred and the prejudiced shipper. If the shipper demonstrates these elements, the burden then shifts to the carrier to demonstrate that the difference is justified by differing transportation conditions."

based on a system of published tariff discounts from separately published undiscounted class rates has now led Transcon to this new type of undercharge campaign.

The disparity between the discounted and undiscounted rates is so great that no regular shipper would have shipped at the undiscounted rates, given the availability of discounts in other carriers' tariffs, and no carrier could survive by charging undiscounted rates. It is only bankrupt carriers, not constrained by market forces or concern for customer goodwill, which seek to apply the undiscounted rates retroactively.

Bankrupt carriers have proved to be highly inventive in finding ways to challenge the competitive rates that attracted shippers' business prior to their bankruptcies. But it is time to ring down the curtain on challenges to coded discount *tariff* rates. Because Transcon's legal position is utterly without merit, its Cross-Petition for writ of certiorari should be denied. If the writ is not denied, the Ninth Circuit's decision with respect to coded rates should be summarily affirmed.

III. REASONS FOR DENYING THE WRIT

A. Transcon Has Misread the Decision Below, Misread *Maislin* and Misread The Act

Transcon believes it has found a loophole in the filed rate doctrine whereby filed discount rates can be jettisoned on a wholesale basis. It is wrong. Though Transcon labors mightily to show that there is something improper about customer account codes, it has not cited a single case for the proposition that a carrier may repudiate a tariff even if it were undisputed that the tariff violates the Interstate Commerce Act. Here, of course, Transcon's claim of invalidity is not only disputed but the very tariff items it challenges were approved by the Commission before and after publication.

With the law so clearly against it, Transcon has been reduced to arguing that this Court should review the decision

below because it is internally inconsistent. Transcon's analysis is based on the following paragraph from the decision below (see ICC Petition in No. 92-1547, Appendix A at 22a):

> In the jargon surrounding the Act, a "legal" rate is the *filed* rate. *See Maislin*, 110 S.Ct. at 2767 ("the filed rate is the *legal* rate"). But a rate is not immune from challenge simply because it is filed; that rate must also comport with the other provisions of the Act. Any challenge to a filed rate is a challenge to its "lawfulness." *See Maislin, id.; Arizona Grocery v. Atchison Ry.*, 284 U.S. 370, 384 (1932); *Chicago, M., St. P. & R. Co. v. Alouette Peat Products*, 253 F.2d 449, 455 n. 5 (9th Cir. 1957); *Southern Pacific Transp. Co. v. San Antonio, Tex.*, 748 F.2d 266, 273-74 (5th Cir. 1984). In the technical language of the Act, an attack on the "legality" of a rate means an allegation that the rate is not a *filed* rate. As *Maislin* proves, a carrier has standing to challenge the legality of its own rates.

Seizing on the last sentence, Transcon rationalizes that (1) the Ninth Circuit recognized that a carrier has standing to challenge the legality of its own rates, though not their lawfulness; (2) so Transcon asserts that its coded rates are illegal (*i.e.*, not "duly" filed) as well as unlawful (*i.e.*, discriminatory); (3) therefore the Ninth Circuit erred in rejecting Transcon's challenge to its own rates on standing grounds. Cross-Petition at 8-9.

Transcon's analysis is disingenuous. As the first sentence of the quoted paragraph plainly states, the filed rate *is* the legal rate. Here, there is no dispute as to the fact that the customer account rates were all filed. Indeed, Transcon notes in its Cross Petition that over 98 percent of the rate items in its discount Tariff 625, on file with the Commission, were customer-coded. As the Ninth Circuit explains, "Any challenge to a filed rate is

a challenge to its 'lawfulness'.... an attack on the 'legality' of a rate means an allegation that the rate is not a *filed* rate." As this analysis establishes, what *Maislin* (and the Ninth Circuit) recognized is the standing of a carrier to challenge the legality of its own *unfiled* rates. Since Transcon's coded discount rates were filed with the ICC in Transcon's published tariffs, there can be no challenge to their legality.

Indeed, the enormity of the burden that Transcon would place upon shippers using filed tariffs would stand the Act on its head. Before a shipper could use a rate, it would not only have to ascertain that the rate is published in the tariff but somehow judge the legality of every note, number and symbol in the tariff. For, if any word, phrase or number in the tariff were "illegal", Transcon's argument would render the use of the rate itself illegal. And even express ICC approval of the form of tariff would not be enough.

Transcon would have shippers second-guess the carrier, the tariff and the Commission, and refuse to pay tariff rates that might subsequently be challenged. It is not clear how this absurd scenario would have helped Transcon. Since its discount rates were in a coded tariff, prescient shippers would not have used Transcon at all, hastening its demise.

The Ninth Circuit correctly read *Maislin*. This Court there observed that "The Act also specifically prohibits a carrier from providing services at any rate other than the filed (also known as tariff) rate.... Deviation from the filed rate may result in the imposition of civil or criminal sanctions on the carrier or shipper. See §§ 11902-11904." 497 U.S. at 119.

The Interstate Commerce Act itself rejects the notion that a rate on file is not the "legal" rate. As provided in 49 U.S.C. § 11916 (emphasis added):

> Where a carrier files with the Interstate Commerce Commission or publishes a particular rate under chap-

> ter 107 of this title or participates in one of those rates, *the published or filed rate is conclusive proof against that carrier, its officers, and agents that it is the legal rate for that transportation or service* in a proceeding begun under section 11902 or 11903 of this title. A departure, or offer to depart, from that rate is a violation of those sections.

Transcon's attempt to evade the requirement that it observe its tariffs "until changed under law" (49 U.S.C. § 11903(b)) by creating a new exception to the filed rate doctrine is frivolous.

B. Transcon's Disagreement With The ICC's Interpretation Of The Motor Carrier Act Of 1980 Does Not Permit It To Ignore Its Own Filed Tariffs

Transcon devotes the bulk of its Cross-Petition to feigned expressions of outrage over the threat of discrimination against its former shippers caused by its own actions. What Transcon proposes as a cure is to inflict serious injury upon every one of its customers, raising all of their rates to the highest levels Transcon can find, in order to "protect" them against a discrimination which none of them is claiming. Ignored in that recitation is the far greater threat to shippers posed by Transcon's "remedy." Shippers who relied on the legality of discount tariffs filed with the ICC, in a form expressly approved by the Commission, would have three years' worth of their freight bills doubled by Transcon, but for the decision below. The Ninth Circuit thus prevented what might have been the most expensive bait and switch operation in American history.

Transcon admits that "the Trustee's challenge to the discount rates as *per se* discriminatory was a challenge to the rates' lawfulness." Cross-Petition at 14. In arguing that its challenge was nevertheless sound, Transcon is forced by the absence of directly supporting precedent to rely on a number of false analogies. Thus at pp. 10-11 it relies on railroad cases from a

period of pervasive regulation and equalized rates (*viz.*, the turn of the century).[4]

At pp. 15-16 Transcon cites Justice (then Judge) Scalia's opinion in *Regular Common Carrier Conference v. United States*, 793 F.2d 376 (D.C. Cir. 1986), condemning, on judicial review of an ICC decision, tariffs that did not contain *rates*, in clear violation of Section 10762. And at page 18 it seeks to invoke analyses applied by the ICC to the propriety of carriers' rates and practices.

These "discrimination" citations are unavailing, for two reasons. First, carriers (and their trustees in bankruptcy) are not the ICC, and are not U.S. courts of appeals. They are not empowered to reverse Commission decisions, no matter how much they may disagree with them. Here, Transcon could have sought judicial review of the ICC's decisions permitting the use of customer account codes. Alternatively, it could have declined to use such codes, or could have published an index of shippers or taken other steps to avoid any "secrecy". However, having filed tariffs containing coded rates, it cannot now retroactively overrule the ICC decisions which granted it specific authority for its actions.

Second, even if the ICC had gone too far in permitting customer account codes (which these Shipper Conferences vigorously deny), no court may "correct" the "error" by in-

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[4] But see *Magnolia Provision Co. v. Beaumont, S. L. & W. Ry. Co.*, 20 F.2d 384 (S.D. Tex. 1927), *aff'd.* 26 F.2d 72 (5th Cir.), *cert. denied* 278 U.S. 620 (1928):

> It would be intolerable if a carrier could file with the Commission and cause to be published a rate, and then avoid its effects as to a specific shipment by claiming either that it violated the long and short haul [discrimination] provision of the law, or that it had failed in some technical requirement, such as noting the fact of an increase or decrease.

20 F.2d at 385.

validating entire filed tariffs.[5] *A fortiori*, this remedy is not available to Transcon on a self-help basis. As expressed in *Genstar Chemical Ltd. v. ICC*, 665 F.2d 1304, 1308 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 905 (1982):

> The Supreme Court long ago rejected the view that a tariff on file with the Commission and never rejected by it should be disregarded or treated as nonexistent merely because of some element of substantive unlawfulness in the rate. *Davis v. Portland Seed Co.*, 264 U.S. 403, 44 S.Ct. 380, 68 L.Ed. 762 (1924), or some irregularity in the tariff filing formalities, *Berwind-White Coal Mining Co. v. Chicago & E.R.*, 235 U.S. 371, 35 S.Ct. 131, 59 L.Ed. 275 (1914). The principle in these cases is that where the shipper has been charged no more than the rate reflected in the tariff on file, the remedy for any unlawfulness or irregularity is measured not by looking to some other tariff but by the harm, if any, caused by the unlawfulness or irregularity. Further, as Genstar concedes, the Commission has had a longstanding policy that even where a tariff is filed without strict compliance with the provisions for tariff filing, the Act does not compel a refund of all charges collected under the tariff. *See, e.g., Ralston Purina Co. v. Atlantic B.&C.R.* 174 I.C.C. 722 (1931); *Concrete Engineering Co. v. Baltimore & O.R.* 160 I.C.C. 675 (1930); *Southern Transportation Co. v. Norfolk & W. Ry.*, 147 I.C.C. 29 (1928); *Greene Cananea Copper Co. v. Chicago, R.I. & P. Ry.*, 88 I.C.C. 225 (1924). The Commission in these cases repeatedly rejected arguments that a

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[5] As this Court explained in *Burlington Northern, Inc. v. United States*, 459 U.S. 131 (1982) (on which the Ninth Circuit relied in the decision below) while federal appellate courts may review ICC orders, that authority "extends to the orders alone, and not to the rates themselves," because "Congress channeled all rate decisions to the Commission in the first instance." 459 U.S. at 140-41.

filed tariff should be treated as nonexistent because it was inconsistent with a Commission limiting order, although the Commission has, where appropriate, awarded a recovery for any harm suffered by the shipper because of the violation.

The putative "harm" from hypothetical discrimination among shippers asserted anomolously by Transcon is not subject to any remedy within the power of the Ninth Circuit to provide. The court below was therefore clearly correct in rejecting Transcon's challenge to the lawfulness of its own rates for lack of standing.

IV. CONCLUSION

For the reasons set forth herein and in the brief in opposition being filed by the ICC and the United States, this Court should deny Transcon's Cross-Petition for a writ of certiorari.

Respectfully submitted,

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Dated: May 24, 1993

APPENDIX

INTERSTATE COMMERCE COMMISSION

DECISION

SPECIAL TARIFF AUTHORITY NO. 86-470

APPLICATION NO. 131

CUSTOMER ACCOUNT NUMBER

DECIDED: February 5, 1986

Transcon Lines, Inc., has requested authority to publish a series of unique code numbers in its tariffs, each code number applying for a different customer. Applicant proposes to have these code numbers control the application of rates and provisions within the tariffs.

As justification, applicant submits that granting this request will facilitate computerization of its rating and billing process, thus enhancing accuracy, improving efficiency and reducing costs.

The Commission granted a similar request for like authority to Roadway Express, Inc., January 30, 1985, in Special Tariff Authority No. 84-9406, Customer Account Numbers. In view of that action by the Commission, we will grant the request.

It is ordered:

Authority is granted to depart from the terms of 49 CFR 1312.13(j) and 1312.14(a)(3).

By the Commission, Suspension/Special Permission Board, Members Llewellyn, Manning and Hall.

(SEAL)

James H. Bayne
Secretary

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REPLY BRIEF

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No. 92-1725

In The

Supreme Court of the United States

October Term, 1992

LEONARD L. GUMPORT, Chapter 7 Trustee of the Bankruptcy Estate of Transcon Lines,

Cross-Petitioner,

v.

INTERSTATE COMMERCE COMMISSION,

Cross-Respondent.

On Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. THE TRUSTEE'S CHALLENGE TO SECRET-CODED DISCOUNT RATES IS NOT AN "IMPROPER COLLATERAL ATTACK" ON ICC DECISIONS 2

II. CONSIDERATION OF THE TRUSTEE'S CHALLENGE TO THE SECRET-CODED DISCOUNT RATES IS NOT "PREMATURE" 4

III. THE *AMICI CURIAE* BRIEF OF THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC. AND HEALTH AND PERSONAL CARE DISTRIBUTION CONFERENCE, INC. LACKS MERIT AND SHOULD NOT BE CONSIDERED 5

CONCLUSION 10

APPENDIX A ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Functional Music, Inc. v. FCC, 274 F.2d 543 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959) 3

Genstar Chemical Ltd. v. ICC, 665 F.2d 1304 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 905 (1982) 7, 9

Louisville & Nashville R.R. Co. v. Central Iron & Coal Co., 265 U.S. 59 (1924) 7

Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116 (1990) 1, 7

Network Project v. FCC, 511 F.2d 786 (D.C. Cir. 1975) 3

Regular Common Carrier Conference v. United States, 793 F.2d 376 (D.C. Cir. 1986) 1

Reiter v. Cooper, 113 S.Ct. 1213 (1993) 1

State of Texas v. United States, 749 F.2d 1144 (5th Cir.), *cert. denied*, 472 U.S. 1032 (1985) 2, 3

DOCKETED CASES AND OTHER MATERIAL

Interstate Commerce Commission v. Transcon Lines, No. 92-1547 6

Reconsideration of Special Tariff Authorities Authorizing the Publication of Customer Account Codes in Tariff, Decision No. 40888 (filed January 5, 1993) 5

STATUTES AND RULES

28 U.S.C. §§ 2342, 2344 2

49 U.S.C. § 10102(14) 8

49 U.S.C. § 10102(15) 8

49 U.S.C. § 10762(a)(1) 1

Sup. Ct. R. 37.1 .....6, 9

INTRODUCTION

The ICC opposes the Trustee's cross-petition for a writ of certiorari on two grounds. The first – that the Trustee lacks standing to challenge the legality of Transcon's secret-coded discount rates – is an ill-constructed circular argument that merits no detailed reply.[1] The

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[1] The ICC argues that because Transcon "filed" its secret-coded discount tariffs, the Trustee "cannot now unilaterally disavow those tariffs." Br. in Opp. at 8. This begs the very question raised by the Trustee's cross-petition. The Trustee acknowledges that TCON 625, which lists Transcon's secret-coded discount rates, was physically delivered to the ICC. But the Interstate Commerce Act ("Act") demands more than that when it requires a carrier to "publish and file" its tariffs. 49 U.S.C. § 10762(a)(1). Only when a tariff is filed and published in accordance with the statutory mandate is it "duly" filed. *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990) (*quoting Louisville & Nashville R.R. Co. v. Maxwell*, 297 U.S. 94, 97 (1915)) ("under the Interstate Commerce Act, the rate of the carrier *duly* filed is the only lawful charge") (emphasis added). Only then does it become a "filed rate" "binding on both the shipper and the carrier." *Reiter v. Cooper*, 113 S.Ct. 1213, 1221 (1993). As set forth in the cross-petition, secret-coded discount tariffs such as TCON 625 are not "duly" filed rates or, for that matter, filed rates at all, because they do not contain within their "four corners" sufficient information to permit carriers, shippers, the general public or, for that matter, the ICC to calculate the applicable tariff in any particular situation. *See* Cross-Pet. at 14, *et seq.* All that TCON 625 discloses is that a carrier may charge from a low of $X to a high of $Y to ship identical goods over identical routes between identical points. Such a tariff is no more valid than the rate averaging tariffs found illegal in *Regular Common Carrier Conference v. United States*, 793 F.2d 376 (D.C. Cir. 1986). Coded tariffs are simply statements that secret concessions are being made to unknown, and possibly fictitious, shippers. The decision of the court of appeals compels the Trustee to enforce such secret rebate deals in contravention of the most basic precepts of the Act.

ICC's second ground – that even if the Trustee has standing to challenge the use of the secret-coded discount rates, his challenge lacks merit, and the similar argument of *amici* – is dealt with below.

I. THE TRUSTEE'S CHALLENGE TO SECRET-CODED DISCOUNT RATES IS NOT AN "IMPROPER COLLATERAL ATTACK" ON ICC DECISIONS

The ICC argues that the Trustee's challenge to the secret-coded discount rates is an "improper collateral attack" against its decision endorsing secret shipper account codes, which was not appealed under the Hobbs Act, 28 U.S.C. §§ 2342, 2344. Br. in Opp. at 16. The ICC made the same argument below, where it was ignored by the court of appeals, and in *State of Texas v. United States*, 749 F.2d 1144 (5th Cir.), *cert. denied*, 472 U.S. 1032 (1985) ("*Texas*"), where it was expressly rejected by the Fifth Circuit. As *Texas* makes clear, judicial review of the statutory authority for the enactment of an agency rule and the application of that rule in a given case is permitted – whether or not Hobbs Act review is sought.

Texas involved a challenge by the State of Texas to an ICC order requiring the State to approve a tariff for intrastate contract carriage. The State contended the tariff was ineffective because it omitted an essential contract term, namely, the rate to be charged. The ICC, however, had previously adopted a rule authorizing the omission of that information from tariffs, and the time had passed for judicial review of that rule under the Hobbs Act. Nonetheless, the court agreed with the State's contention that it was not barred from asserting a challenge to either

the ICC's statutory authority to adopt the rule or to the rule as applied. *Id.* at 1146; *see also Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959) (allowing attack against FCC rules three years after promulgation).

The ICC argued in *Texas* that review of its tariff rule "as applied" must be limited to an examination of "whether 'the adjudicated facts conform to the rule and whether the rule should be waived or applied in that particular instance.' " *Id.* at 1146 (*quoting Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974)). The court rejected that argument, noting that *Pacific Gas* applied only to review of a rule in subsequent *administrative* proceedings, and stated, "the cases suggest the opposite, *especially when the contention is that the rule lacks statutory authorization.*" *Id.* at 1146 (footnote omitted) (emphasis added).

In this case, the Trustee argues that Transcon's secret-coded discount rates are illegal because they violate the Act's publication requirement, and that ICC decisions endorsing secret shipper account codes directly conflict with the Act. Cross-Pet. at 16-17. *Texas* and *Functional Music* establish that the Trustee is not barred from making this challenge – even though Transcon had, but did not avail itself of, an opportunity for direct attack on the rule under the Hobbs Act. *See Network Project v. FCC*, 511 F.2d 786 (D.C. Cir. 1975) (party who filed objections in agency rule making proceeding but failed to seek judicial review permitted to attack substantive validity of rule when applied in subsequent proceedings).

II. CONSIDERATION OF THE TRUSTEE'S CHALLENGE TO THE SECRET-CODED DISCOUNT RATES IS NOT "PREMATURE"

Opposing review by this Court, the ICC avers that the "significance" of the Trustee's challenge is "limited" by the ICC's "recent decision to reconsider whether to retain, modify, or eliminate its authorization for the filing of rates using shipper codes. . . . " Br. Opp. at 16. This allegation lacks merit. On May 25, 1993, less than 24 hours after the ICC filed its brief, the ICC acted on its decision to "reconsider" *by reaffirming its prior authorization of the use of secret codes.*[2] If any "limitation" on the significance of the Trustee's challenge existed as a result of the ICC's decision to reconsider its endorsement of secret account codes, which the Trustee denies, that limitation was lifted by the ICC itself when it reaffirmed that endorsement.

Moreover, the ICC's suggestion – for which it offers no legal authority – that consideration by this Court of the issues raised in the Trustee's cross-petition is "premature" pending Hobbs Act review of its recent reaffirmation of the propriety of secret codes is nonsensical. Br. Opp. at 17. As the ICC concedes, the use of secret account codes has been widespread in the trucking industry since *1986,* when the ICC first issued its blanket authorization.

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[2] The reported decision is not yet available. According to an ICC press release, the ICC "clarified" that the "use of undisclosed customer codes is acceptable" where the tariff adequately discloses the commodities and locations involved. We have reprinted the ICC's press release in relevant part in the appendix to this reply.

Br. Opp. at 3. As the ICC also concedes, it has reaffirmed that authorization once before, in 1991. *Id.* The ICC can neither insulate its prior endorsement of the use of secret account codes nor preclude this Court from considering the issues properly and timely raised in the Trustee's cross-petition through last minute, successive decisions to "reconsider," and then to reaffirm, that endorsement. This case is not premature.[3]

III. THE *AMICI CURIAE* BRIEF OF THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC. AND HEALTH AND PERSONAL CARE DISTRIBUTION CONFERENCE, INC. LACKS MERIT AND SHOULD NOT BE CONSIDERED

The National Small Shipments Traffic Conference, Inc. and Health and Personal Care Distribution Conference, Inc. – two lobbying groups for their shipper-members (the "Shipper Groups") – have filed a joint motion for leave to file a brief as *amici curiae* in opposition to the Trustee's cross-petition. While the Trustee agreed to the

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[3] It must be recalled that "Congress . . . requested the Commission to initiate a proceeding to consider" whether "allow[ing] carriers to publish tariff rates for shippers identified only through the means of unexplained account codes listed in the tariffs . . . complies with the rate disclosure requirements of the Interstate Commerce Act. . . ." *Reconsideration of Special Tariff Authorities Authorizing the Publication of Customer Account Codes in Tariffs*, Decision No. 40888 (filed January 5, 1993). That request was rebuffed when the ICC "reaffirmed" its policy of allowing secret coded tariffs. The matters that were of Congressional concern now are presented to the Court by the Trustee's cross-petition. Those important questions are ripe for review, and may never be resolved absent this Court's intervention.

Shipper Groups' request to file as *amici curiae* a brief in support of the ICC's petition for certiorari in the companion case of *Interstate Commerce Commission v. Transcon Lines*, No. 92-1547, he refused consent in this case. As he advised the Shipper Groups, he did so because their *amici* brief in the companion case contained numerous misstatements and irrelevant matter.[4] Their proposed brief here is similarly objectionable.

The Shipper Groups, for instance, assert that even if the ICC went "too far in permitting customer account codes" no court could correct the error by invalidating the tariff and that, *a fortiori*, this remedy is not available to the Trustee on a "self-help basis." *Amici* Br. at 13-14. That assertion is irrelevant and misstates the facts.

First, the assertion is irrelevant because it begs the question presented in this case, namely, whether the unfiled and unpublished secret-coded discount rates in TCON 625 are duly filed and published tariffs within the meaning of the Act or whether, as the Trustee contends, they are merely announcements that shippers listed there by indecipherable numerical codes have been granted secretly negotiated discounts from the filed bureau rates. *See* Cross-Pet. at 19. If, as the Trustee contends, the rates are not duly filed and published, there is no tariff to be "invalidated." Instead, the Trustee is required under

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[4] The Trustee also observed that the Shipper Groups were advancing only the private interests of their members, and that the Acting Solicitor General and the Department of Justice were more than capable of bringing all relevant matters to the attention of the Court. *See* Sup. Ct. R. 37.1.

Maislin to collect undercharges on the basis of the undiscounted bureau rates, which concededly are part of Transcon's filed rate.[5] For this reason, the Shipper Groups' reliance on *Genstar Chemical Ltd. v. ICC*, 665 F.2d 1304, 1308 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 905 (1982) ("*Genstar*") is misplaced. *Amici* Br. at 14.

Genstar, an overcharge action, involved a carrier's failure to comply with requirements governing a rate increase. The tariffs disclosed all the information needed to determine the rate charged the shipper and the amount necessary to refund to the shipper to remedy any actual harm. The court declined to void the increase and held that a filed tariff should not be rejected merely because of some element of substantive unlawfulness in the rate or some irregularity in the tariff filing formalities. *Id.* at 1308. *Genstar's* rule of substantial compliance is inapplicable where, as here, the defects render a purported tariff a nullity. TCON 625's coded discounts were simply announcements that shippers listed by indecipherable numerical codes had been granted discounts from the filed bureau rates. *The key to the numerical codes was neither*

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[5] Claiming that its members "relied on the legality" of the secret-coded discount rates, the Shipper Groups assert that the Trustee should not receive a windfall, i.e., Transcon's higher filed rate, from a decision that the secret-coded discount rates are not duly filed and published. *Amici* Br. at 12. The same claim was raised and rejected in *Maislin*, where this Court stated that a carrier is *required to collect the filed rate, and that "equities" are not relevant to the application of that requirement.* 497 U.S. at 126-127. *See also Louisville & Nashville R.R. Co. v. Central Iron & Coal Co.*, 265 U.S. 59, 65 (1924) (carrier's conduct cannot estop or preclude it from enforcing payment of filed rate).

filed with the ICC nor open to public inspection.[6] This left shippers no way to determine whether the rates Transcon gave them were higher, lower or the same as the rates Transcon gave the shippers' competitors, or even whether the rate applied to them.[7] *See* Cross-Pet. at 17. Even the ICC is at a loss to decipher those tariffs. *See* Cross-Pet. at 17, fn. 15 (letter from ICC's Chief, Section of Rates and Informal Cases, explaining that ICC is unable to determine if discount applied to particular shipper). The

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[6] The record includes a declaration in which Transcon's former Manager of Rates explained: "Transcon's discount tariffs are secret rebate agreements. They are designed to hide rather than 'publish' freight rates." He disclosed that Transcon filed tariffs that deliberately coded shipper names and that Transcon kept a key to the codes in its office – but did not file that key with the ICC. He further swore that "the tariff on file with the Interstate Commerce Commission does *not* contain a cross-reference to customer names . . . and therefore no one who looks at the official tariff on file at the Commission could know who is getting [the] discounted rate." 1 SER at 18-19 (emphasis in original). That evidence is undisputed by the ICC.

[7] The ICC attempts to diminish the significance of this fact by arguing that the Act does not expressly require that shippers' names be published. Br. in Opp. at 13-14. That point begs the question whether the ICC's secret code policy is in direct conflict with the Act's filing, publication and anti-discrimination requirements. The ICC's own internal office of Compliance and Consumer Assistance answered that question in the affirmative. Cross-Pet. at 17. In fact, the Act presupposes that common carriers, unlike contract carriers, will *never* tie a rate to the identity of a shipper. *Compare* 49 U.S.C. § 10102(14) (definition of "motor common carrier") *with* 49 U.S.C. § 10102(15) (definition of "motor contract carrier").

Shipper Groups' reliance on *Genstar* is also misplaced because it is flatly inconsistent with the ICC's "four corners rule," which the ICC has used to prevent the collection of undercharges by invalidating tariffs for rate or filing irregularities far less serious than the failure to identify the identity of a shipper granted a discount rate. *See* Cross-Pet. at 17-18.

Second, the assertion misstates the facts. The Trustee has not "invalidated" the secret-coded rates on a "self-help basis." The Trustee made no attempt to pursue undercharge claims based on the illegality of the secret-coded rates until *after* the district court held that secret-coded rates violated the Act's publication requirement. For this reason, the Shipper Groups' puzzling, albeit self-evident, observation that the Trustee is neither the ICC nor a court of appeals and is "not empowered to reverse Commission decisions," *Amici* Br. at 13, is also irrelevant.

A further illustration of the Shipper Groups' misstatements is their incorrect assertion that the court of appeals was "repelled" by the Trustee's challenge to Transcon's secret-coded discount rates. *Amici* Br. at 2. The Shipper Groups have it backwards. In fact, the court of appeals "admit[ted] to being troubled by the ICC's policy of allowing codes alone to identify shippers," and explained that "[s]uch a practice leads to secrecy, and secrecy makes possible discrimination in rate-setting." Cross-Pet. at 5.

The purpose of an *amicus curiae* brief is to bring to the attention of the Court relevant matter that has not already been brought to its attention by the parties. Sup. Ct. R. 37.1. In view of its inclusion of irrelevant matter

and misstatements of law and fact, the Shipper Groups' brief does not meet that standard.

CONCLUSION

For the foregoing reasons, and those stated in the Trustee's cross-petition, the cross-petition for a writ of certiorari should be granted, the judgment should be summarily reversed, and the case remanded with instructions to the court of appeals to decide the merits of the Trustee's challenge to the legality of Transcon's secret-coded discount rates.

Respectfully submitted,

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APPENDIX A

ICC NEWS

FOR RELEASE
WEDNESDAY, MAY 26, 1993
No. 93-149

ICC ANNOUNCES RESULTS OF MAY 25 VOTING CONFERENCE

Docket No. 40888, *Reconsideration of Special Tariff Authorities Authorizing the Publication of Customer Account Codes in Tariffs.* The Commission voted (4-1) to modify the outstanding authority permitting customer codes, so as to clarify that use of undisclosed customer codes is acceptable only where the tariff otherwise adequately discloses the traffic to which the rate will be applied, *i.e.*, specifies the commodities and/or locations involved. Staff were instructed to come up with sufficiently concrete guidelines as to how much specificity is required as to make the acceptance of such tariffs for filing administratively workable. The Commission also noted that objections to such tariffs could be overcome by simply filing in tariff form the names of shippers and their corresponding codes and voted to instruct carriers that use shipper codes to immediately furnish all shippers with written confirmation of their account codes.

Supreme Court, U.S.
FILED
MAY 27 1993
OFFICE OF THE CLERK

No. 92-1725

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

LEONARD L. GUMPORT, CHAPTER 7 TRUSTEE OF THE BANKRUPTCY ESTATE OF TRANSCON LINES,

v.

INTERSTATE COMMERCE COMMISSION

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMICUS CURIÆ IN OPPOSITION

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the trustee of a bankrupt interstate motor carrier has standing to claim that he has no obligation to adhere to the carrier's filed tariffs that allegedly do not comply with the provisions of the Interstate Commerce Act.

Table of Contents

Page

Table of Authorities iii

REASONS FOR DENYING THE WRIT..... 2

ARGUMENT 2

CONCLUSION..... 7

Table of Authorities

Page

Cases

Allen v. Wright, 468 U.S. 737 (1984) 6

Arizona Grocery Co. v. Atchison, T.&S.F. Ry. Co., 284 U.S. 370 (1932) 3

Berwind - White Coal Mining Co. v. Chicago & Erie Railroad Co., 235 U.S. 371 (1914) 5

Davis v. Portland Seed Co., 264 U.S. 403 (1924) 5

Genstar Chemical, Ltd. v. Interstate Commerce Commission, 665 F.2d. 1304 (D.C. Cir. 1981) *cert. denied*, 456 U.S. 905 (1983) 5

ICC v. American Trucking Associations, Inc, 467 U.S. 354 (1984) 4

Lujan v. Defenders of Wildlife, --- U. S. --- , 60 U. S. L. W. 4495 (1992) 6

Magnolia Provision Co. v. Beaumont, S.L.&W. Ry., 20 F.2d 834 (S.D. Tex. 1927), *aff'd*, 26 F.2d 72 (5th Cir.), *cert. denied*, 278 U.S. 620 (1928) 4

Maislin Industries, U.S. Inc. v. Primary Steel, Inc. 497 U.S. 116 (1990) 5

Statutes

49 U.S.C. §10762 1

49 U.S.C. §10761(a) 3

49 U.S.C. §11762(a) 3

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

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v.

INTERSTATE COMMERCE COMMISSION

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMICUS CURIÆ IN OPPOSITION

The National Industrial Transportation League, as *amicus curiae,* respectfully urges this Court to deny the cross-petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit. The court of appeals correctly determined that a trustee of a bankrupt motor carrier of property subject to the Interstate Commerce Act lacks standing to pursue a claim that he is not bound by the carrier's tariffs on file with the Interstate Commerce Commission on the grounds that the filed tariffs did not disclose information assertedly necessary to satisfy the general tariff provisions of 49 U.S.C. §10762.

REASONS FOR DENYING THE WRIT

The questions presented by the cross-petitioner, Leonard L. Gumport, Chapter 7 Trustee of the Bankruptcy Estate of Transcon Lines ("Gumport"), do not warrant review by this Court. First, there are no court opinions contrary to the Ninth Circuit's ruling that Gumport, in his capacity as a representative of Transcon Lines ("Transcon"), lacked standing to attack the lawfulness of Transcon's tariff rate structure. Second, Gumport's argument here, that he was attacking the "legality," in addition to the "lawfulness," of Transcon's tariff discounts, is both *post-hoc* sophistry and immaterial. It merely presents an issue that already has been clearly resolved by the jurisprudence of this Court.

ARGUMENT

Gumport appears effectively to have conceded that the decision below correctly held that, as the representative of the estate of Transcon Lines, he lacked standing to challenge the lawfulness of the carrier's tariffs. He contends here that his suit was misunderstood by the circuit court in that he challenged both the "lawfulness" and the "legality" of the carrier's account code tariff rates. In his cross-petition Gumport asserts:

> This, then, is the crux of the case. If, as the Trustee contends, his challenge was to the *legality* of the rates, as well as to

> their lawfulness, the court of appeals' standing decision was improper. . . .

Cross-Petition at 9 (emphasis in original).

The Ninth Circuit in fact was astutely aware of the distinction between a "legal" and a "lawful" rate. On the one hand, ". . . an attack on the 'legality' of a rate means an allegation that the rate is not a *filed* rate." ICC App. at 22a (emphasis in original).* "But a rate is not immune from challenge simply because it is filed; that rate must also comport with the other provisions of the Act. Any challenge to a filed rate is a challenge to its 'lawfulness'." *Id*

These propositions are long and well established principles of federal transportation law. This Court's opinion in *Arizona Grocery Co. v. Atchison Topeka & Santa Fe Ry. Co.*, 284 U. S. 370, 384-85 (1932) is often cited as authority for the distinction between "legal" and "lawful" rates. As the court below correctly ruled, the rate contained in a carrier's tariff on file at the ICC is its "legal" rate, *i.e.*, the rate which by statute is the legally applicable rate. 49 U.S.C. §§ 10761(a) and 10762(a). However, a legally applicable rate is not necessarily lawful. The rate may be legal because it has been filed in a tariff with the Commission, but it

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* Citation's are to the appendix to the Petition of the Interstate Commerce Commission for Certiorari in No. 92-1547, seeking review of another issue in the Ninth Circuit's decision.

also may violate substantive provisions of the Interstate Commerce Act and, therefore, be unlawful.

Gumport has repeatedly criticized Transcon's discount tariff structure, asserting that it was discriminatory because it contained shipper specific rates and identified each shipper by an account code number that was not made available to the public. Cross-petition at 6-19. Since Gumport concedes that "the Trustee's challenge to the discount rates as *per se* discriminatory was a challenge to the rates' unlawfulness," *Id.* at 14, his attempt now to dress what is "admittedly" a question of lawfulness in a cloak of "illegality" is transparent and unpersuasive. *Id.*

However, even if, as Gumport contends, his attack upon Transcon's discount tariffs included a question as to their "legality," then he would have been required to demonstrate that those tariff discounts were not accepted by the ICC and were not placed on the Commission's public tariff file. "Where tariffs are tendered to and accepted by the Commission, the rates therein become applicable, even though technically they should have been rejected upon tender." *ICC v. American Trucking Associations, Inc.*, 467 U. S. 354, 363, n 7 (quoting *Acme Peat Products, Ltd. v. Akron, C. & Y. R. Co.*, 277 ICC 641, 644 (1950)). A carrier cannot disavow unilaterally the terms of its filed tariff rates on the grounds that the rates are in violation of the Interstate Commerce Act. *Magnolia Provision Co. v. Beaumont, S. L. & W. Ry.*, 20 F.2d 834 (S. D.

Tex. 1927), *aff'd*, 26 F.2d 72 (5th Cir.), *cert. denied*, 278 U.S. 620 (1928). As one court recently explained:

> The Supreme Court long ago rejected the view that a tariff on file with the Commission and never rejected by it should be disregarded or treated as non-existent merely because of some element of substantive unlawfulness in the rate, *Davis v. Portland Seed Co.*, 264 U. S. 403, 44 S. Ct. 380, 68 L. Ed. 762 (1924), or some irregularity in the tariff filing formalities, *Berwind - White Coal Mining Co. v. Chicago & Erie Railroad Co.*, 235 U. S. 371, 35 S. Ct. 131, 59 L. Ed. 275 (1914).

Genstar Chemical Ltd. v. Interstate Commerce Commission, 665 F 2d. 1304, 1308 (D. C. Cir. 1981), *cert. denied,* 456 U. S. 905 (1983).

The material facts of record in this case are not contested. Transcon formally filed with the Commission, and the Commission accepted, tariff publications containing the rates which Gumport now seeks to avoid. By his own admission, at least "[n]inety percent of all discounts given by Transcon *were listed in a separate tariff filed with the Commission* labeled 'TCON 625.'" Cross-petition at 4 (emphasis added); see also ICC App. at 5a (same). Thus, Gumport's reliance on the Ninth Circuit's comment that *Maislin Industries, U. S., Inc. v. Primary Steel, Inc.* 497 U. S. 116 (1990)

recognized a carrier's standing to challenge the "legality" of its own rates is fundamentally misplaced. *Maislin* disallowed the enforceability of *unfiled* rates. Clearly that is *not* the issue here.

Stripped to its essence, Gumport's argument simply is that this Court should sharply extend *Maislin* and overrule other Supreme Court precedent. *Maislin* held that the Commission could not supplant a tariff rate with a non-tariff rate solely upon the basis that the shipper and carrier had agreed to do business at the non-tariff rate. Gumport would ask that this Court now rule that courts can reject tariffs filed with and maintained for public inspection at the Commission, years after they were filed, on the grounds that technical statutory or regulatory requirements arguably were not fully met. The Court on a number of occasions already has rejected this approach and there is no reason to take up Gumport's current request for further review of a settled question of law.

It is clear that well-established principles of federal transportation law prevent Gumport from asserting claims that Transcon's own discount tariffs were not permitted by the Interstate Commerce Act. Under equally well-settled principles of the law of standing, the court of appeals correctly held that Gumport could not pursue such claims against shippers. *Lujan v. Defenders of Wildlife,* ---- U. S. ---,---, 60 U.S.L.W. 4495, 4497 (1992) and *Allen v. Wright,* 468 U.S. 737, 751 (1984).

CONCLUSION

The cross-petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be denied.

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